

**SUMMARY OF COMMENTS AND ATTORNEY GENERAL'S RESPONSE
HEALTH FACILITY TRANSACTION REGULATIONS AMENDMENTS**

1. Lucy Johns: Comments received by letter dated July 15, 2004:

A. Comment: Renumbered section 999.5(a)(2) should be amended to provide for Attorney General review if the transaction affects more than 20% of the value of the health facility or facilities that are the subject of the transaction rather than 20% of the value of all health facilities operated or controlled by the nonprofit corporation.

A. Response: This recommendation has not been adopted and is beyond the scope of this rulemaking proceeding. In addition, the current version of renumbered section 999.5(a)(2) is more consistent with the language of Corporations Code sections 5914 and 5920 than the proposed amendment.

B. Comment: Existing section 999.5(d)(5)(C) should be amended to require submission of information in the notice on the volume of services provided, demographic characteristics of the patients to whom services were provided, and the sources of revenue, by payor, for the services provided.

B. Response: An amendment to section 999.5(d)(5)(C) is proposed in response to this comment. Although the information described in the comment is routinely included in healthcare impact statements, this information is not currently required to be provided in the notice. The proposed amendment ensures that this necessary information is provided at the beginning of the review process.

C. Comment: Existing section 999.5(d)(5) should be amended to require that health facility revenue and cost information submitted to the Attorney General should comply with

OSHPD reporting requirements and include the latest independent financial audit for each health facility.

C. Response: This recommendation has not been adopted and is beyond the scope of this rulemaking proceeding. OSHPD financial data is readily available public information. Existing section 999.5(d)(11)(F) requires the submission of the two most recent audited financial statements.

D. Comment: Existing section 999.5(d)(5)(D) should be amended by substituting the phrase “actual expense or imputed value” for the word “cost.”

D. Response: This recommendation has not been adopted, is beyond the scope of this rulemaking proceeding, and is not a necessary clarification of the existing regulations.

E. Comment: Existing section 999.5(d)(5) should be amended to require submission to the Attorney General of the medical staff bylaws and a list of active medical staff by department, specialty, and address.

E. Response: This recommendation has not been adopted, and is beyond the scope of this rulemaking proceeding. Existing regulations allow the Attorney General to request this information when it is needed to properly evaluate the proposed transaction.

F. Comment: Existing section 999.5(d)(5)(H) should be amended to require submission to the Attorney General of a list of community organizations and individuals who were contacted in the development of any proposed measure to mitigate any significant adverse healthcare effects from the proposed transaction.

F. Response: This recommendation has not been adopted and is beyond the scope of this rulemaking proceeding. It also overlaps existing section 999.5(d)(10) which requires an

applicant to describe efforts made to inform local governments, hospital staff and employees, and the general public of the proposed transaction and describe any comments or reaction to that effort.

G. Comment: Existing section 999.5(e)(6)(A) should be amended to require that the independent healthcare impact statement assess the effect of the proposed transaction on infectious disease services, and on outpatient services especially for chronic diseases.

G. Response: This recommendation has not been adopted, and is beyond the scope of this rulemaking proceeding. Existing section 995.5(e)(6)(A) requires an assessment of the impact of the proposed transaction on any healthcare services provided by the hospital which could include infectious disease services and various types of outpatient services.

H. Comment: Existing section 999.5(e)(6)(B) should be amended to require that the discussion of charity care in the independent healthcare impact statement assess the effect of the proposed transaction on recipients of charity care and expressly cover the preceding five year period.

H. Response: This recommendation has not been adopted and is beyond the scope of this rulemaking proceeding. Any reasonably complete discussion of charity care would necessarily cover the effect of the proposed transaction on recipients of charity care. Because the applicant is required by existing section 999.5(d)(5)(A) to submit charity care information for the preceding five year period, the report prepared from that data will, in most cases, cover a five year period.

I. Comment: Existing section 999.5(e)(6)(C) should be amended to require that the independent healthcare impact statement assess the effect of the proposed transaction on

healthcare services to any class of patients of concern to the affected community.

I. Response: This recommendation has not been adopted, is beyond the scope of this rulemaking proceeding and is not a necessary clarification of existing regulations.

J. Comment: Proposed section 999.5(e)(6)(D) should be amended to require that the discussion of community benefit programs expressly cover the preceding five year period.

J. Response: This recommendation has not been adopted, is beyond the scope of this rulemaking proceeding and is not a necessary clarification of existing regulations.

K. Comment: Proposed section 999.5(f)(3)(A)(7) should be amended to require that the Attorney General's review of fair market value include consideration of whether any formal and professional valuation appraisals were from independent third parties.

K. Response: This recommendation has not been adopted, is beyond the scope of this rulemaking proceeding, and is not a necessary clarification of existing regulations.

L. Comment: Proposed section 999.5(f)(8)(C) should be amended to require continuation at the hospital of existing levels of infectious disease services and reproductive health services.

L. Response: This recommendation has not been adopted. Proposed section 999.5(f)(8)(C) has been redrafted to state the Attorney General's policy on continuation of existing services and retain the Attorney General's existing discretion to adopt conditions on a case-by-case basis. A further description of specific services that might be covered by this policy is unnecessary.

M. Comment: The proposed amendment to section 999.5(g)(1) should be adopted.

M. Response: No response is required.

N. Comment: The deadline for a decision on proposed amendments to an Attorney

General consent to a health facility transaction, as set forth in proposed section 999.5(h)(3) should be extended from 60 days to 90 days.

N. Response: This recommendation has been adopted.

2. Keith Hearle/Lewin Group: Comments received by e-mail dated August 11, 2004:

A. Comment: The definition of “material amount of the assets or operations” in renumbered section 999.5(a)(2) is vague and needs clarification.

A. Response: This recommendation has not been adopted and is beyond the scope of this rulemaking proceeding. The current version of renumbered section 999.5(a)(2) is consistent with the language of Corporations Code sections 5914 and 5920.

B. Comment: The confidentiality provision in current section 999.5(c)(3) is subject to abuse by an over broad designation of documents as confidential.

B. Response: . Amending current section 999.5(c)(3) is beyond the scope of this rulemaking proceeding. The current provisions on confidentiality have not been abused by applicants.

C. Comment: The addition of the phrase “ with the *cy pres* doctrine and” in proposed section 999.5(d)(4)(B) should be adopted.

C. Response: No response is necessary.

D. Comment: Proposed section 999.5(d)(5)(C) should be amended to require submission of information in the notice of patient origin statistics and service area demographic profiles.

D. Response: An amendment to section 999.5(d)(5)(C) is proposed in response to this comment. Although the information described in the comment is routinely included in healthcare impact statements, the provision of this information is not currently required to be

included in the notice. The proposed amendment ensures that this necessary information is provided at the beginning of the review process.

E. Comment: Existing section 999.5(e)(2) should be amended to provide a 60 day extension period rather than the current 45 day period.

E. Response: This recommendation has not been adopted. Corporations Code sections 5915 and 5921 limit the extension period to 45 days.

F. Comment: The regulations should authorize the Attorney General to request additional information beyond the information that is included in the notice itself.

F. Response: Existing section 999.5(c)(2) currently provides the Attorney General with this authority and allows the Attorney General to deny consent to a transaction if necessary information is not provided.

G. Comment: Existing section 999.5(e)(6)(A) should be amended to require that the independent healthcare impact statement assess the effect of the proposed transaction on outpatient services, and on services necessary for the facility's current license status.

G. Response: This recommendation has not been adopted and is beyond the scope of this rulemaking proceeding. Existing section 995.5(e)(6)(A) requires an assessment of the impact of the proposed transaction on any healthcare services provided by the hospital which could include outpatient services and services required to maintain a license.

H. Comment: Existing section 999.5(e)(6)(B) should be amended to require that the discussion of charity care in the independent healthcare impact statement expressly cover the preceding five year period.

H. Response: This recommendation has not been adopted and is beyond the scope of this rulemaking proceeding. Because the applicant is required by existing section 999.5(d)(5)(A) to submit charity care information for the preceding five year period, the report prepared from the data will, in most cases, cover a five year period.

I. Comment: Section 999.5(e)(6)(D) should be amended to incorporate the definition of “community benefit” in SB 697.

I. Response: This recommendation has not been adopted, is beyond the scope of this rulemaking proceeding and is not a necessary change to the existing regulations

J. Comment: Proposed section 999.5(g) should be amended to require the acquiring corporation to submit an annual report that documents compliance with all conditions.

J. Response: This recommendation has not been adopted. Several of the recent consent decisions have included this requirement. An evaluation of the effectiveness of this requirement is necessary before it is adopted as a regulation.

K. Comment: Proposed section 999.5 (h) should be amended to allow for the preparation of a healthcare impact statement for proposed changes to consent terms and conditions.

K. Response: This recommendation has not been adopted. The Attorney General has authority under section 999.5(g)(2) to retain a consultant to prepare a healthcare impact statement on proposed amendments if necessary. Any additional requirement could limit the Attorney General’s discretion to use procedures that are appropriate to the specific type of amendment under consideration.

L. Comment: The proposed regulations should be amended to require that the terms and conditions of any Attorney General consent are binding on all subsequent owners of the health facility.

L. Response: This recommendation has not been adopted. Such a requirement is not necessarily proper in all transactions reviewed by the Attorney General or for all terms and conditions adopted by the Attorney General. The substance of this recommendation can be addressed on a case-by-case basis in the consent decision.

3. Catholic Healthcare West: Comments received by letter dated August 16, 2004 from James R. Schwartz:

A. Comment: Proposed section 999.5(d)(2) should be amended to state that transactions between nonprofit entities are not required to be at fair market value.

A. Response: Unlike Corporations Code section 5917, subdivision (c), which applies to transactions involving for-profit entities, Corporations Code section 5923, subdivision (c), does not require a determination that a transaction between nonprofit entities is **at** fair market value. It only requires consideration of fair market value. Proposed section 999.5(f)(3) has been redrafted to reflect this distinction.

B. Comment: The reference to the *cy pres* doctrine in proposed section 999.5(d)(4)(B) should be deleted because consistency with that doctrine is not legally required.

B. Response: To avoid confusion, the reference to the *cy pres* doctrine in proposed section 999.5(d)(4)(B) has been deleted and a description of the substance of that doctrine, consistency with existing charitable purposes, has been added.

C. Comment: The proposed amendments to section 999.5(e)(5) requiring a healthcare impact statement if a hospital has more than 50 acute care beds should be deleted.

C. Response: This recommendation has not been adopted.

D. Comment: Proposed section 999.5(f)(8)(B) should be deleted; the Attorney General should continue to adopt charity care requirements on a case-by-case basis.

D. Response: Proposed section 999.5(f)(8)(B) codifies the Attorney General's ordinary practice of requiring continuation of existing levels of charity care in approving a hospital transaction. While codification of this policy is warranted, there is merit to the concern that the proposed section, as drafted, may inhibit health facility transactions and unnecessarily curtail the Attorney General's discretion in conditioning approval of transactions. Proposed section 999.5(f)(8)(B) has been redrafted to state the Attorney General's policy on charity care, while retaining existing discretion to adopt conditions on a case-by-case basis.

E. Comment: Proposed section 999.5(f)(8)(C) should be deleted; the Attorney General should continue to address healthcare service issues on a case-by-case basis.

E. Response: Proposed section 999.5(f)(8)(C) codifies the Attorney General's ordinary practice regarding continuation of existing services, especially emergency room services, in approving a hospital transaction. While codification of this policy is warranted, there is merit to the concern that the proposed section, as drafted, may inhibit health facility transactions and unnecessarily curtail the Attorney General's discretion in conditioning approval of transactions. Proposed section 999.5(f)(8)(C) has been redrafted to state the Attorney General's policy on continuation of existing services, while retaining existing discretion to adopt conditions on a case-by-case basis.

F. Comment: In regard to proposed section 999.5(h), the Attorney General may not have authority to amend the terms and conditions of consent decisions. Proposed section 999.5(h) should be amended to allow subsequent purchasers to use the amendment process, should only apply to express conditions adopted by the Attorney General or material matters in a health facility transaction agreement, and should provide for requests for interpretation by the Attorney General of health facility transaction decisions.

F. Response: Proposed section 999.5(h) has been amended to allow successors in interest to use the amendment process. It has also been amended to exempt modifications to an agreement that are not material to the Attorney General's consent decision. Section 999.5(h) has also been modified to retain the Attorney General's ability to interpret the provisions of consent decisions.

4. California Healthcare Association: Comments received by letter dated August 16, 2004:

A. Comment: Proposed section 999.5(f)(8)(B) should be deleted. If adopted, that proposed section would discourage hospital acquisitions and innovation in hospital operations. The Attorney General currently has authority to implement the proposed section on a case-by-case basis.

A. Response: Proposed section 999.5(f)(8)(B) codifies the Attorney General's ordinary practice of requiring continuation of existing levels of charity care in approving a hospital transaction. While codification of this policy is warranted, there is merit to the concern that the proposed section, as drafted, may inhibit health facility transactions and unnecessarily curtail the Attorney General's discretion in conditioning approval of transactions. Proposed section

999.5(f)(8)(B) has been redrafted to state the Attorney General's policy on charity care, while retaining existing discretion to adopt conditions on a case-by-case basis.

B. Comment: Proposed section 999.5(f)(8)(C) should be deleted. If adopted, that proposed section would discourage actions that might result in better healthcare services to the affected community. The Attorney General currently has authority to implement the proposed section on a case-by-case basis.

B. Response: Proposed section 999.5(f)(8)(C) codifies the Attorney General's ordinary practice regarding continuation of existing services, especially emergency room services, in approving a hospital transaction. While codification of this policy is warranted, there is merit to the concern that the proposed section, as drafted, may inhibit health facility transactions and unnecessarily curtail the Attorney General's discretion in conditioning approval of transactions. Proposed section 999.5(f)(8)(C) has been redrafted to state the Attorney General's policy on continuation of existing services, while retaining existing discretion to adopt conditions on a case-by-case basis.

5. Kaiser Foundation Hospitals: Comments received by letter dated August 16, 2004:

A. Comment: Proposed section 999.5(f)(8)(B) should be deleted. If adopted, that proposed section would discourage hospital acquisitions and innovation in hospital operations. The Attorney General currently has authority to implement the proposed section on a case-by-case basis.

A. Response: Proposed section 999.5(f)(8)(B) codifies the Attorney General's ordinary practice of requiring continuation of existing levels of charity care in approving a hospital transaction. While codification of this policy is warranted, there is merit to the concern that the

proposed section, as drafted, may inhibit health facility transactions and unnecessarily curtail the Attorney General's discretion in conditioning approval of transactions. Proposed section 999.5(f)(8)(B) has been redrafted to state the Attorney General's policy on charity care and retain existing discretion to adopt conditions on a case-by-case basis.

B. Comment: Proposed section 999.5(f)(8)(C) should be deleted. If adopted, that proposed section would discourage actions that might result in better healthcare services to the affected community. The Attorney General currently has authority to implement the proposed section on a case-by-case basis.

B. Response: Proposed section 999.5(f)(8)(C) codifies the Attorney General's ordinary practice regarding continuation of existing services, especially emergency room services, in approving a hospital transaction. While codification of this policy is warranted, there is merit to the concern that the proposed section, as drafted, may inhibit health facility transactions and unnecessarily curtail the Attorney General's discretion in conditioning approval of transactions. Proposed section 999.5(f)(8)(C) has been redrafted to state the Attorney General's policy on continuation of existing services, while retaining existing discretion to adopt conditions on a case-by-case basis.