



MEMORANDUM

DATE: January 16, 2025

TO: Commissioners

FROM: Wynnee Hawk, Director, Health Care Facilities Planning and Development
Jeanne Marie Gawel, Chief, Long Term Care Policy and Planning

RE: Staff Recommendation for Adoption of Final Regulations:
COMAR 10.24.01, *Procedural Regulations for Health Care Facilities and Services* and
COMAR 10.24.20 *State Health Plan for Facilities and Services: Comprehensive Care Facility Services*

Staff of the Maryland Health Care Commission (MHCC or Commission) recommend that the Commission approve the final amendments to COMAR 10.24.01, *Procedural Regulations for Health Care Facilities and Services* and the repeal and replacement of COMAR 10.24.20, *State Health Plan for Facilities and Services: Comprehensive Care Facility Services* as final regulations.

In COMAR 10.24.01, the Commission proposes to amend existing Regulations .01, .03, and .12, adopt new Regulation .21, and recodify existing Regulations .21 and .22 to be Regulations .22 and .23 under COMAR 10.24.01 *Procedural Regulations for Health Care Facilities and Services*. For COMAR 10.24.20, the Commission proposes to repeal existing Regulation .01 and adopt new Regulation .01 under COMAR 10.24.20 *State Health Plan for Facilities and Services: Comprehensive Care Facility Services*, which is incorporated by reference. Both sets of proposed regulations were considered and approved by the Commission at an open meeting held on September 19, 2024. The proposed regulations were printed in the Maryland Register, published November 15, 2024, Volume 51, Issue 23. Public comment to the proposed revisions were accepted through December 16, 2024.

I. Background

In the 2023 session, the General Assembly passed Chapters 288 and 289 (SB 509/HB 702), which required MHCC, in consultation with stakeholders, to study the expansion of the Commission's certificate of need (CON) authority over nursing home acquisitions. The Commission was to assess the elimination of patient rooms with more than two beds and any other issues related to acquisitions. The study reviewed the impact of changes of ownership, including private equity

investment, on the quality of care in nursing homes. The *Nursing Home Acquisitions and Licensure Recommendations Report* was submitted to the Legislature in January 2024. The 2024 General Assembly passed legislation implementing many recommendations in the Report as Chapters 816 and 817 (SB1000/HB1122). The proposed regulations implement this legislation, and make additional updates to the State Health Plan's standards related to quality and Medicaid participation, as well as the need methodology.

II. Key Changes to the Regulations

The 2024 legislative changes to the statute, as reflected in the final regulations is MHCC's enhanced role in reviewing nursing home acquisitions. MHCC will have the authority to approve, approve with conditions or deny an acquisition. In addition, under the current regulations, the quality standard is limited because it is based solely on the Medicare Five-Star Rating System. If approved, the final regulations would offer a more comprehensive and holistic approach to examining the quality of a nursing home. Lastly, while the current regulations require an applicant to enter into a memorandum of understanding (MOU) with Medicaid to maintain a minimum percentage of Medicaid participation, Medicaid no longer enforces the MOUs; the proposed regulations therefore require Medicaid participation as a condition on the Commission's approval, rather than an MOU with Medicaid.

III. Comments Received

The Commission received one public comment to the proposed regulations from the Health Facilities Association of Maryland (HFAM). The full response from HFAM can be found on the Commission website.¹ Staff considered and analyzed the comments and recommends very limited, non-substantive revisions to the final regulations based on these comments and on internal discussions. The following summarizes the comments received and staff's response.

COMAR 10.24.01, *Procedural Regulations for Health Care Facilities and Services*

.21B Effective Duration of Certificate of Need and Applicant Responsibilities

HFAM Comment

HFAM acknowledges that the proposed revisions to the State Health Plan chapter exempts transfers involving real property owners without bed rights and without operational control over the nursing home from acquisition review. However, it urges a further revision to permit a similar exemption affidavit to be submitted if a landlord has bed rights but not operational control over a facility stating, "this is beyond the authority of the MHCC. Under the Nursing Home Acquisition legislation, Health-General Article Section 19-114(a)(A-1) (1) a change of ownership involving assets is covered only if it results in a change of the person that controls a health care facility." HFAM also states section .21B(1)(b)(i) should be amended to read: "Transfers of stock or assets of the owner of the real property and improvements, bed rights, or operation of the nursing home, or any combination thereof unless otherwise exempt under the Commission's statute or regulations."

¹ https://mhcc.maryland.gov/mhcc/pages/hcfs/hcfs_shp/hcfs_shp.aspx



Staff Response

Commission staff recommends adding language to COMAR 10.24.01.21B to clarify that the acquisition approval process does not apply to acquisitions exempted from these requirements. However, MHCC staff rejects the rest of HFAM's suggestions. MHCC's authority over nursing homes extends beyond the entity licensed to operate the nursing home by the Department of Health. MHCC approval is required before beginning any construction to establish or relocate a nursing home, or expand a facility's physical bed capacity, i.e. changes to the real property and improvements. MHCC has authority over changes in a bed rights holder because "bed rights" are the legal rights associated with the Commission's approval of nursing home beds, and do not include approvals required by other State or federal entities. Further, a holder of bed rights maintains significant control over a nursing home because the holder has the right to make decisions about how the beds are used and whether they are sold or relocated.

COMAR 10.24.20 *State Health Plan for Facilities and Services:* *Comprehensive Care Facility Services*

.03C Policy Statements

HFAM Comment

HFAM asks that policy 5.1 be revised to specify who must supply information on full ownership and for what period.

Staff Response

Commission staff recommend no changes in response to this comment noting that this is a policy statement that guides the standards throughout the chapter. The specific requirements on ownership disclosure are contained in the standards governing CON, exemption, and acquisition approvals.

.04 Procedural Rules: Nursing Homes

HFAM Comment

This regulation requires notice of transfers of 5% or more ownership interest in the real property and improvements, bed rights, or operation of a nursing home, or any combination thereof. This amendment permits MHCC to monitor changes of ownership that do not meet the definition of an acquisition under the regulations. HFAM states this language should be qualified by the caveat "unless otherwise exempt under the Commission's statute or regulations."

Staff Response

Commission staff do not recommend a change in response to this comment. The changes of ownership for which notice is required under this section are meant to be more expansive than changes that would require full acquisition review.

.05 Nursing Home Standards

HFAM Comment

HFAM suggests that standard (2) on Medicaid participation be removed. HFAM states that there is not a Medicaid access issue in Maryland and Medicaid thresholds should not be imposed upon an acquisition as a new condition. HFAM also states that facilities not now subject to an MOU should not be subject to any such condition. If MHCC keeps this requirement, HFAM states that the required Medicaid participation rate should be set as of the application date or other definite date.

Staff Response

Commission staff recommend no changes in response to this comment and maintains that because Medicaid no longer enforces the Medicaid MOU, an MOU requirement should not remain a standard in the chapter. Instead, a nursing home should be required to meet a minimum Medicaid participation threshold as a condition of the Commission's approval. The required level of participation is not intended to be stagnant; nursing homes will be expected to comply with minimum participation requirements as they are updated by the Commission. The participation requirements are regularly posted on the MHCC website and can be accessed at the following link: https://mhcc.maryland.gov/mhcc/pages/hcfs/hcfs_ltc/hcfs_ltc.aspx

HFAM Comment

HFAM points out that the quality standard at Regulation .06A(8)(a) requires an applicant to demonstrate it will provide high-quality of care by reporting on the overall Five Star rating for all nursing homes owned or operated by the applicant or a related or affiliated entity for three years prior to the letter of intent for a CON or other submission. While HFAM acknowledges that the requirement is more focused in the proposed regulations than earlier drafts, HFAM recommends further revisions. First, HFAM recommends that landlord entities that own bed rights but do not operate or control nursing homes should be exempt from this requirement. Second, HFAM states that "all nursing homes cannot, by definition, be at 3 stars or above" and that an applicant may not be able to demonstrate good cause for not meeting the CMS star rating threshold if it does not have a controlling interest in a disclosed nursing home.

Staff Response

Commission staff recommend no changes in response to this comment and will not exempt bed rights holders from the standards because of the existing legal and control rights over the nursing home beds previously discussed. An applicant's lack of control over a low-performing nursing home could be part of its argument that there is good cause for not meeting the threshold if it can otherwise demonstrate the likelihood it will provide adequate quality of care at the nursing home subject to the request.

HFAM Comment

HFAM states that standard 8(e) requires an applicant to demonstrate appropriate infection prevention and control policies and practices at the nursing home that is the subject of the request, with disclosures of COVID, flu and pneumonia vaccination rates of staff and residents and suggests that this provision should refer to how the applicant will prospectively approach these areas. HFAM also states that this disclosure should be informational but not a barrier.

Staff Response

Commission staff recommend no changes in response to this comment. For this standard, the Commission would consider the infection prevention and control policies at the nursing home that is subject to the request for a CON or exemption request, or at an applicant's existing facilities, for an acquisition request. The Commission has the option to approve an application with conditions if there were concerns about infection prevention and control policies.

.06 Request for Acquisition Approval

HFAM Comment

HFAM comments that MHCC cannot require approval of a transfer of real estate owned by a landlord who does not own bed rights or own or control the licensed nursing home and the definitions for "acquisition" and "transfer" should be updated to exclude them. HFAM also comments that acquisitions of real property with bed rights should also be exempted from the acquisition approval requirements when the landlord entity does not have any direct role in operations or management.

Staff Response

Commission staff recommend no changes in response to this comment. As stated in previous responses, MHCC has broad authority over the various components of a nursing home. MHCC maintains its position that the owner of the bed rights of a nursing home has control over the facility and should not be excluded from the acquisition review process.

HFAM Comment

HFAM acknowledges that the proposed regulations now add an exception to Medicaid participation for nursing home beds in a CCRC exempt from CON regulation, but states that both the policy statements at 10.24.20.03C and the acquisition standard at 10.24.20.06B(3) should limit the scope of this requirement to projects that would otherwise require a CON.

Staff Response

Commission staff recommend no changes in response to this comment. There is an important public policy interest in encouraging Medicaid participation at nursing homes and Commission staff notes that the standard appropriately excludes nursing home beds in a CCRC that are exempt from CON regulation.

IV. Staff Recommendation

Staff recommends the Commission approve COMAR 10.24.01, *Procedural Regulations for Health Care Facilities and Services* and COMAR 10.24.20 *State Health Plan for Facilities and Services: Comprehensive Care Facility Services*, as final regulations.



December 13, 2024

SENT VIA EMAIL

Mr. Ben Steffen
Executive Director
Maryland Health Care Commission
4160 Patterson Avenue
Baltimore, MD 21215

RE: Comments on Proposed Changes to COMAR 10.24.01 and 10.24.20 Published in November 15, 2024, Maryland Register

Dear Ben:

Thank you for all you do. I hope this letter finds you well at work and home. As you know HFAM and our broader team of member leaders, members, and consultants worked long and hard ALONGSIDE you and others for the passage of Nursing Home Acquisition legislation under Senate Bill 1000, (Chapter 816) and HB 1122 (Chapter 817).

On November 15, 2024, the MHCC published in the Maryland Register proposed regulations and updates to the certificate of need regulations at COMAR 10.24.01 and the State Health Plan Chapter on comprehensive care facilities (nursing homes) at COMAR 10.24.20 with comments due by Monday December 16, 2024. We certainly wish to acknowledge and express appreciation for the MHCC's consideration of August 15, 2024, comments on a working draft of the regulatory changes which is reflected in the proposed regulations.

As we have noted, many of the proposed MHCC changes align with the intent of SB 1000/HB 1122, but some may present implementation challenges and could benefit from certain adjustments to enhance their practicality. We urge further consideration of a few changes that, while discussed in our August 15, 2024, comments, have not been fully addressed in the proposed regulations.

Comments Regarding Proposed Changes to CON Regulations Under COMAR 10.24.01

Section .21A (1): In our August 15 comments, we explained our position that the reference to the changes of ownership over real property and improvements should be removed. The MHCC has authority over health care facilities and in this context, this refers to the licensed nursing home under Health-General Article, Section 19-1401. This definition is consistent with the Nursing Home Acquisition legislation under SB 1000/HB 1122. A landlord entity does not hold a nursing home license.

So too Section .21B(1)(b)(i) seeks to require approval of acquisitions of landlord entities that are not a licensed healthcare facility. This is beyond the authority of the MHCC. Under the Nursing Home Acquisition legislation, Health-General Article Section 19-114(a)(A1) (1) a change of ownership involving assets is covered only if it results in a change of the person that controls a health care facility.



We appreciate that under the proposed revisions to the Chapter at COMAR 10.24.20.04 and .06 language was added that the MHCC may exempt acquisitions that only involve real property based on an affidavit. Also, acquisitions greater than 5% but not greater than 25% are notice only, under Health-General Article, Section 19-114(a-1) (2) based on Chapter 817. For these reasons, Section .21B(1)(b)(i) (referring to acquisition approvals) should be amended to read: "Transfers of stock or assets of the owner of the real property and improvements, bed rights, or operation of the nursing home, or any combination thereof unless otherwise exempt under the Commission's statute or regulations".

Comments on Proposed State Health Plan Comprehensive Care Facility (Nursing Home) Chapter Changes: COMAR 10.24.20

.03C: Policy Statements

Regarding the language stating that "the Commission will require that an applicant seeking to establish, renovate, replace or acquire a nursing home serve an equitable proportion of Medicaid Eligible individuals in the jurisdiction or region" we reiterate the following from our August 15 comments. 10.24.20.06 B (3) adds an exception to Medicaid participation for nursing home beds in a CCRC exempt from CON regulation. But this is a limited exception, and the proposed extension of authority remains. Both sections 10.24.20.03 C & 10.24.20.06 B (3) should limit the scope of applicability of this requirement to projects that would otherwise require a CON.

There is NO shortage of Medicaid beds in Maryland nursing homes for Marylanders in need.

- The Commission does not have authority over nursing home renovations or replacements on the current site with the removal of the capital expenditure threshold. This reference should only refer to projects that otherwise require a CON.
- Expansions using waiver beds are permitted by statute and cannot be conditioned on a Medicaid occupancy requirement.
- Former Policy 2.0 should be carried over, permitting a nursing home with an existing MOU to obtain approval to come under the current formula on request under a modified condition to approval.

Regarding the language under Policy 5.1 stating that "Commission to require full ownership disclosure including the legal names of owners, related or affiliated entities, ownership structure, including parent and subsidiary companies and historical ownership information," There should be clarity on who should provide this information and for what period.

04C: Nursing Home Acquisitions and other Transfers of Ownership:

.04C(1)(b)(iii) was added:

Includes transfers of ownership interest involving the owner of the real property and improvements, bed rights, or operation of the nursing home, or any combination thereof.

This language should be qualified by the caveat "unless otherwise exempt under the Commission's statute or regulations."

05A: General Standards:

- The standard requiring a certain percentage of Medicaid occupancy should be removed as there is not a Medicaid access issue in Maryland.
- This should not be imposed upon an acquisition as a new condition. Facilities not now subject to an MOU should not be subject to any such condition.
- Where this condition is imposed it should set the percentage as of the application date or other definite date.

- The MOU has a clear process for a corrective action plan when a facility fails to meet its percentage goals. That process should be maintained.

Where a facility is being renovated or replaced on-site without additional beds added, the MHCC does not have approval authority.

To demonstrate it will provide high-quality of care, the applicant must report on its overall Five Star rating for all nursing homes owned or operated by the applicant or a related or affiliated entity for three years prior to the letter of intent for a CON or other submission. The three-star requirement is removed as a barrier, but substantial information must be supplied if the disclosed facilities have an average rating below 3 Stars including inspection actions, staffing measure information, and Short- and Long-Term Quality Measure performance.

In our August 15 comments, we noted this could be a MASSIVE submission and advocated for a more focused approach to capturing relevant information capable of effective review. This was addressed under the proposed regulations at COMAR 10.24.20.05.(A)(8).

We reiterate comments from August 15 about the MHCC seeking this kind of information from landlord entities that own bed rights but do not operate or control nursing homes is substantial and should not be the same as where there is a change in operation or control. Such information is not relevant and should not be required where such a landlord entity did not directly or through an affiliate own or operate the licensed nursing home. Substantial information would need to be gathered and evaluated by the MHCC concerning operational performance over which the landlord entity has no control. We urge a further revision to permit an exemption affidavit to be submitted documenting that a landlord has bed rights but not operational control over a facility.

Section .05A(8)(b) remains very problematic. It states that if “any” disclosed nursing home has an average star rating below 3 stars substantial information about inspections, staffing and quality measures is to be provided. All nursing homes cannot, by definition, be at 3 stars or above. Moreover, the Applicant may, through a related or affiliated entity, own or have owned less than a controlling interest in a disclosed nursing home and so would not be in a position to obtain or cause the actions required to be taken to demonstrate good cause.

Under Section .05A(8)(e) the applicant is to demonstrate appropriate infection prevention and control policies and practices at the nursing home that is the subject of the request, with substantial disclosures of COVID, flu and pneumonia vaccinations of staff and residents. The disclosure must include policies, procedures and practices. This provision, as applicable to the applicant, should refer to how the applicant will prospectively approach these areas. This should be treated as informational disclosures but not a barrier.

Section .06 Contains the Standards pertaining to the Acquisition of Nursing Homes:

Section.06A details the Request for Acquisition Approval and the grounds for denial.

As in the same comment above under COMAR 10.24.01, the absence of authority at the MHCC to require approval of a transfer of real estate owned by a landlord who does not own bed rights or own or control the licensed nursing home applies here too. Corresponding changes to the definitions of Acquisition and Transfers under Section .08B (1) and (40) are needed.

So, for example, it is impracticable for a landlord entity, even one with bed rights, to demonstrate under Section .06A(4)(h) that the landlord “has the financial capacity to operate the nursing home for at least 90 days;” when the landlord does not operate the facility.

Under Section .06A (3) an affidavit of exemption process is outlined. This affidavit process should be extended to acquisitions of real property with bed rights but where the landlord entity does not have any direct role in operations or management. It is impractical for a landlord entity to be required to held to the requirements for facility performance where it has no such role. The following change is warranted:

The Commission may exempt from the requirements of this regulation an acquisition that involves only changes in the ownership of the real property, provided that:

(a) The real property purchaser does not have any overlapping ownership with [DELETE the bed rights owner or] operatorship of the nursing home;

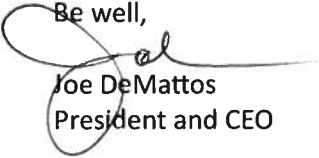
(b) The real property purchaser does not have any direct or indirect role in the operations or management of the nursing home; and

(c) The bed rights owner of the nursing home provides a notice to the Commission at least 60 days prior to the proposed closing date of the acquisition of real property that includes: (i) The information required under Regulation .04C(I)(a); and

(ii) An affidavit under the penalties of perjury that paragraphs (a) and (b) of this subsection are true.

Finally, on behalf of the members and leaders of HFAM, as well as myself personally, I extend my genuine and heartfelt gratitude for the longstanding collegial partnership between our two organizations. Ben Steffen is a true giant in healthcare leadership and policy, a Mensch in every sense. He will be deeply missed.

Be well,



Joe DeMattos
President and CEO

CC: HFAM Board of Directors
Howard L. Sollins, Esq.
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