

DRAFT

Guidance Regarding Exemptions From The DMHC General Licensure Regulation

I. Background Regarding Regulation

The Department of Managed Health Care (DMHC) recently adopted a regulation that, among other things, defines various types of risk and requires entities that assume any amount of global risk to either obtain a license under the Knox-Keene Health Care Service Plan Act of 1975 (Knox-Keene Act) or receive an exemption¹ from the DMHC for the contract(s) under which the entity assumes global risk.²

The regulation applies to any contract entered into, amended, or renewed on or after July 1, 2019. For purposes of this guidance, “Entity” refers to any person or organization that:

1. does not have a Knox-Keene Act license, or is not licensed as an insurer by the California Department of Insurance (CDI); and,
2. assumes any amount of global risk on a pre-paid or periodic basis, including a payment at the end of a contract or term.

The DMHC has determined that a number of contracts, although technically falling within the ambit of the new regulation, do not need to comply with the regulation at this time because the Director of the DMHC has determined it is in the public interest and not detrimental to the protection of subscribers, enrollees, or person regulated under this chapter, and the regulation of these contracts is not essential to the purposes of the

¹ The receipt of an exemption from the application of the general licensure regulation does not mean the DMHC “approves” the terms of the contract for other purposes. Notwithstanding the grant of an exemption, the DMHC may find that a contract violates other portions of the Knox-Keene Act if the contract conflicts with the requirements of the Act. Such conflicts could include, but are not limited to: the requirement that medical decisions be rendered by qualified medical providers unhindered by fiscal management; the requirement that medical decisions be made by qualified medical professionals acting within the scope of licensure; and, the requirement that enrollees have timely access to medically necessary care.

² This guidance does not address applications for licensure under the Knox-Keene Act. For questions regarding licensure, please contact the DMHC at duty.counsel@dmhc.ca.gov.

Knox-Keene Act. These types of contracts are described in Section II below. Entities entering into these types of contracts do not need to file the contracts with the DMHC.

For all other contracts that involve the assumption of global risk, including those contracts that involve only “upside” risk, the DMHC is phasing in the exemption application process and temporarily expediting exemption requests to give Entities time to comply with the regulation and to ensure an orderly implementation of the regulation. The phase-in period is July 1, 2019, to December 31, 2019.

During the phase-in period, Entities that assume global risk must file with the DMHC their global risk contracts within 30 days of execution of the contract by all parties.³ They do not need to receive an exemption from the DMHC before finalizing or beginning performance under the contract.

As discussed in detail below, during the phase-in period, the DMHC will automatically grant an exemption to contracts submitted to the DMHC by Entities pursuant to this guidance. The duration of the exemption is for either the term of the contract or one year, depending on whether a licensed health plan is a party to the contract.

II. Contracts/Arrangements That Do Not Need To Be Filed With The DMHC

A. Bundled Payment, Case Rate, Diagnosis-Related Group Payments, and Per Diem Arrangements.

The DMHC understands that some arrangements between DMHC-licensed health plans, hospitals, and/or provider groups involve bundled payments, case rates, diagnosis-related group (DRG) payments or per diem payments pursuant to which the provider (typically a hospital and/or provider group) assumes financial responsibility for providing or arranging for all services associated with an episode of care. In exchange for the bundled payment, the hospital/provider agrees to provide or arrange for all necessary care, including hospital services, professional services, and other attendant medical services, associated with the episode.

Bundled payment, case rate, DRG and per diem arrangements do not need to be filed with the DMHC at this time.⁴

³ Neither the regulation nor this guidance relieves DMHC-license health plans from the obligation to file their contracts with the DMHC for review and approval as required by the Knox-Keene Act and its implementing regulations, including California Code of Regulations, title 28, section 1300.51.

⁴ If an arrangement/contract involves both bundled payments, case rates, DRG payments and/or per diems, plus other types of global risk sharing, such as risk pools or global budgets, the Entity assuming global risk must apply for an exemption.

B. CMS Accountable Care Organizations

The Centers for Medicare and Medicaid Services (CMS) supports a number of models of Accountable Care Organizations (ACOs) through which providers, hospitals and CMS contract to provide coordinated care to Medicare patients. CMS selected the organizations that participated or are participating in these ACO models.

Entities that are not DMHC-licensed health plans (e.g., medical groups, hospitals) do not need to submit their contracts pursuant to which they participate in a CMS ACO, as the DMHC finds those contracts to be outside the requirements of the regulation.⁵ Entities do not need to file these contracts with the DMHC at this time.

C. Arrangements Where the Payer is a CDI Licensed Insurer

To the extent an Entity assumes global risk as defined under the regulation, and all of the consumers impacted by the global risk arrangement are covered by a CDI-licensed insurer, the DMHC has determined such arrangements to be outside the requirements of the regulation. Entities do not need to file these contracts with the DMHC at this time.

III. Expedited Processing of Exemption Requests During Phase-In Period

A. Prior DMHC approval is not required for contracts entered into, amended, or renewed during the phase-in period of July 1, 2019 to December 31, 2019.

For all contracts involving any amount of global risk (other than the contracts/arrangements discussed in Section II, above) an Entity enters into, amends or renews⁶ between July 1, 2019, and December 31, 2019, the Entity or someone acting on the Entity's behalf, must submit a Request for Expedited Exemption to the DMHC no later than 30 days after all parties have executed the contract or 30 days after performance under the contract has started, whichever is earlier. Upon receipt of the Request for Expedited Exemption, the DMHC will deem the contract to be exempt from the requirements of the regulation and will issue an Order of Exemption.

The duration of the exemption will be either:

- the term of the contract, if a DMHC-licensed health plan is a party to the contract; or
- one year from the date the DMHC grants the exemption if a DMHC-licensed health plan is not a party to the contract.

⁵ DMHC-licensed health plans should continue to submit their provider contracts to the DMHC for review and approval per the requirements of the Knox-Keene Act.

⁶ The DMHC considers an “evergreen” renewal to be a renewal, requiring the Entity to obtain a new exemption for the contract.

B. Which Entities must file the Request for Expedited Exemption?

Each Entity assuming global risk under the contract must file a Request for Expedited Exemption with the DMHC.

In a contract where only one party assumes global risk, only the party assuming global risk needs to apply for an exemption. Below are two examples of contracts that would need to be filed with the DMHC and the Entities that would need to file.

- Example 1: A hospital and provider group have a contract under which the *provider group* will receive a bonus/shared savings if certain targets are met. The contract does not contain a similar provision for the hospital. In this example, the provider group is assuming global risk but the hospital is not, because the hospital is at risk only for the services it provides. Therefore, the provider group must file for an exemption but the hospital does not need to file.
- Example: A hospital and a provider group set a global budget to provide care (institutional and professional) for a population of consumers. The hospital and provider group will share any savings achieved if the total expenditure for the population is less than the global budget. In this example, both the hospital and the provider group have assumed global risk and each must file for an exemption.

C. What must an Entity file to obtain an expedited exemption?

To obtain an expedited exemption, the Entity, or a person acting on the Entity's behalf (e.g., an attorney), must submit to the DMHC:

1. A copy of the executed contract.
2. The Request for Expedited Exemption Form (**attached as Appendix 1 to this guidance**) or a cover letter that includes all of the information requested in the form.

D. What if the Entity wants the contract, or a portion thereof, to be treated as confidential?

If the Entity wants the DMHC to treat the contract or any portion thereof as confidential, in addition to submitting the contract and the Request for Expedited Exemption Form, the Entity must also:

1. Submit a justification for confidential treatment that includes the basis for the request and the time period for which the Entity wants confidential treatment. The DMHC has created a Request for Confidentiality form submitters may use to

request confidential treatment. **The form is attached Appendix 2 to this guidance.**

2. If the Entity seeks confidential treatment for a portion of the contract (e.g., payment rates), submit a copy of the contract with the confidential information redacted and a copy of the contract without redactions. The DMHC will treat the redacted version of the contract as public and subject to requests under the California Public Records Act.

The Entity **should not submit** to the DMHC any other information required under the regulation (e.g., financial statements, geographic service areas, percentage of annualized income from institutional risk, estimated number of enrollees) at the time the Entity submits the request for an expedited exemption.

E. Where should the Entity submit its request for an expedited exemption?

Submit the information outlined above to the DMHC either by emailing the information to OPLInquiries@dmhc.ca.gov or mailing the information to the DMHC addressed as follows: Department of Managed Health Care, ATTN: Office of Plan Licensing, Exemption Request, 980 9th Street, 5th Floor, Sacramento, CA 95814.

Please direct questions regarding this guidance to _____.