

Are Changes in Ownership of Assets Changes in Control?

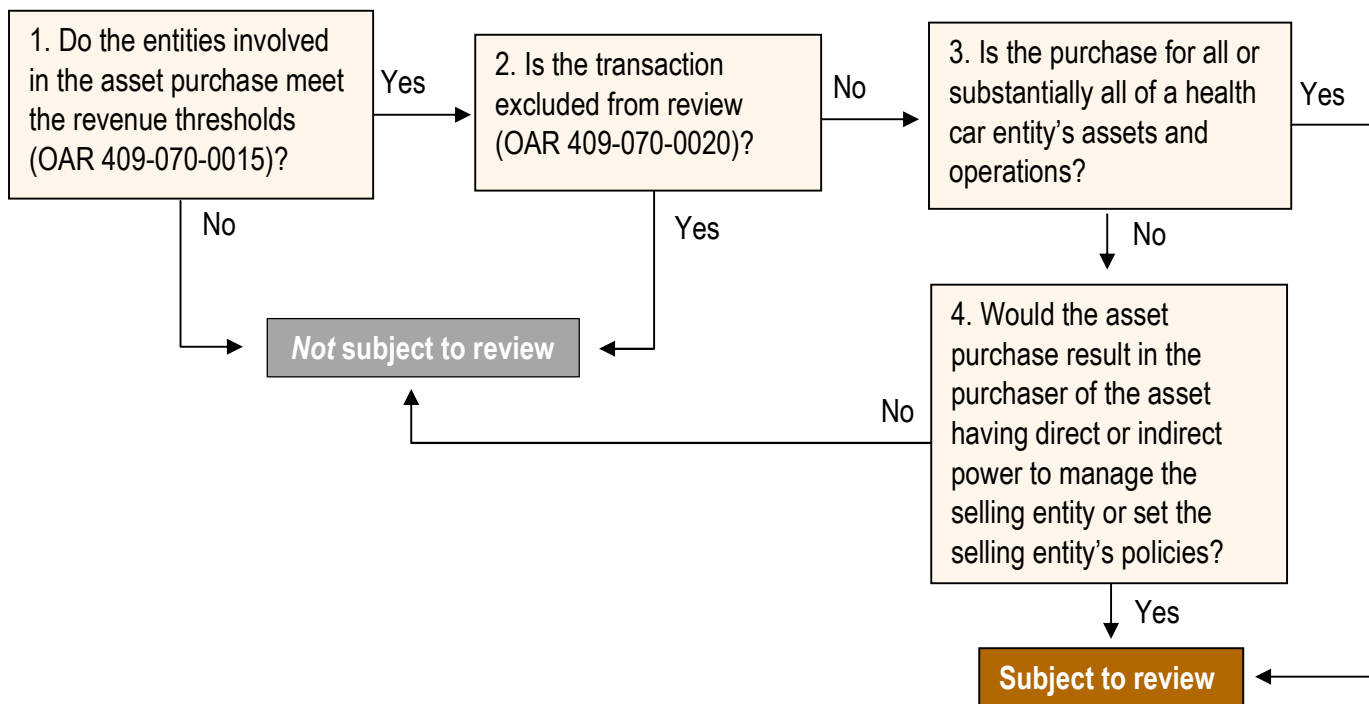
Changes in control are an important concept for the Health Care Market Oversight Program. To determine if a transaction is subject to review by the Program, entities may need to determine whether the transaction would result in a change of control. This document provides additional guidance for entities to determine if a proposed transaction involving a change in ownership of assets would be a change in control. The guidance is based on the provisions regarding control provided in ORS 415.500 and the Oregon Administrative Rules for the Program.

Changes in Ownership of Assets

As defined in OAR 409-070-0005, the concept of control relates to the direct or indirect power to manage a legal entity or set the legal entity's policies. (See below for complete definition).

A change in ownership of assets does not necessarily equate to a change in control. As codified in OAR 409-070-0010(2), a transaction in which a person or entity acquires all or substantially all of a health care entity's assets and operations is considered an acquisition and is therefore subject to review. However, the purchase of only some of an entity's assets does not, by itself, equate to an acquisition.

When determining if a purchase of assets is a material change transaction and therefore subject to review, entities should consider the following four questions:



1. The first question is whether the entities involved in the asset purchase meet the revenue thresholds outlined in OAR 409-070-0015.
2. If the revenue thresholds are met, entities should determine whether the transaction is otherwise excluded from review under OAR 409-070-0020.
3. If the answer to question 1 is “yes,” and the answer to question 2 is “no,” the third question is whether the purchase is for *all or substantially all* of the health care entity’s assets and operations. In this case, the asset purchase is an acquisition under OAR 409-070-0010 and therefore subject to review.
4. Finally, if the answer to question 3 is “no,” the fourth question is whether the asset purchase would result in the purchaser having direct or indirect power to manage the selling entity or set the selling entity’s policies. If the answer is “no,” then the sale of the asset would not, in isolation, result in a change of control.

A material change transaction that is reviewable may also include a proposed asset purchase.

Examples:

1. A hospital enters into a lease purchase arrangement whereby all of its furniture and equipment is sold to a financing company. The hospital corporation retains ownership of the hospital’s building and land and the right to operate the hospital and determine the scope of hospital operations. The financing company has not acquired all or substantially all of the hospital’s assets and operations. Therefore, there has been no change of control.
2. A hospital sells all of its furniture, equipment, buildings, and land to a management company but retains its corporate structure and license. The management company acquires the right to operate the hospital and determine the scope of hospital operations. The management company has acquired all or substantially all of the hospital’s assets and operations. Therefore, there has been a change of control.

Calculating Control Percentage

As defined in OAR 409-070-0025, control is rebuttably presumed when an entity acquires 10% or more of any class of voting securities for domestic health insurers and Coordinated Care Organizations or 25% or more of any class of voting securities for entities other than domestic health insurers and Coordinated Care Organizations. A person may seek to rebut this presumption through an application for disclaimer of control (for insurers and CCOs, a disclaimer of affiliation), which is submitted to DCBS for domestic health insurers and to OHA for other health care entities. Control is irrebuttably presumed when an entity acquires 50% or more of any class of voting securities of any health care entity. (See below for the complete OAR 409-070-0025).

The purchase of an asset does not, by itself, entail the acquisition of any voting securities. Therefore, entities should not include an asset purchase when determining the acquired percentage of any class of voting securities, unless other provisions of the transaction give the asset purchaser the voting rights of a security holder.

Reminder – if an acquisition includes all or substantially all of a health care entity’s assets as part of a covered material change transaction, that transaction is subject to review by the Health Care Market Oversight Program.

Statutory and Rule Guidance

ORS 415.500

(1) "Corporate affiliation" has the meaning prescribed by the Oregon Health Authority by rule, including:

- (a) Any relationship between two organizations that reflects, directly or indirectly, a partial or complete controlling interest or partial or complete corporate control; and
- (b) Transactions that merge tax identification numbers or corporate governance.

(6)(b) "Material change transaction" does not include:

(C) An affiliation that:

- (i) Does not impact the corporate leadership, governance or control of an entity; and
- (ii) Is necessary, as prescribed by the authority by rule, to adopt advanced value-based payment methodologies to meet the health care cost growth targets under ORS 442.386.

(D) Contracts under which one health care entity, for and on behalf of a second health care entity, provides patient care and services or provides administrative services relating to, supporting or facilitating the provision of patient care and services, if the second health care entity:

- (i) Maintains responsibility, oversight and control over the patient care and services; and
- (ii) Bills and receives reimbursement for the patient care and services.

OAR 409-070-0005 Definitions

(8) "Control" means the direct or indirect power to manage a legal entity or set the legal entity's policies, whether by owning voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position or corporate office.

(29) "Voting security" means a security that entitles the owner or holder of the security to vote at a meeting of shareholders, a membership interest having voting rights in a limited liability company or nonprofit corporation, a partnership interest having voting rights in a limited or general partnership or any other type of instrument that confers on the holder of the instrument voting rights in the governance of a legal entity. A "voting security" also includes a security that is convertible into a voting security or that is evidence of a right to acquire a voting security.

OAR 409-070-0010 Covered Transactions

(2) An acquisition of a health care entity occurs when:

- (a) Another person acquires control of the health care entity including acquiring a controlling interest as described in OAR 409-070-0025;
- (b) Another person acquires, directly or indirectly, voting control of more than fifty percent (50%) of any class of voting securities of the health care entity other than a domestic insurer as described in OAR 409-070-0025(1)(c);
- (c) Another person acquires all or substantially all of the health care entity's assets and operations;
- (d) Another person undertakes to provide the health care entity with comprehensive management services; or
- (e) The health care entity merges tax identification numbers or corporate governance with another entity.

OAR 409-070-0020 Excluded Transactions

(1) Pursuant to Section 1(6)(b) and (7) of the 2021 Act, the following transactions are not material change transactions subject to review under these rules:

...

(c) An affiliation that, pursuant to Section 1(6)(b)(C) of the 2021 Act:

(A) Does not impact the corporate leadership, governance or control of a health care entity; and

(B) Is necessary to adopt AVP methodologies to meet the health care cost growth targets under ORS 442.386.

...

(f) A transaction that consists solely of a change in the immediate or intermediate ownership of a health care entity but which

(i) does not change the ultimate ownership or control of the health care entity, and (ii) does not result in the acquisition of control of the health care entity by any person not previously affiliated with the health care entity.

OAR 409-070-0025 Acquisition of Control; Presumptions and Disclaimers

(1) The following presumptions will apply in determining whether a transaction involving a health care entity results in the acquisition of direct or indirect control of that health care entity:

(a) A transaction shall be rebuttably presumed to involve an acquisition of control of a health care entity that is a domestic health insurer or a coordinated care organization if a person, directly or indirectly, acquires voting control of ten percent (10%) or more of any class of voting securities of the domestic health insurer or the coordinated care organization.

(b) For a health care entity other than a domestic health insurer or coordinated care organization, a transaction shall be rebuttably presumed to involve an acquisition of control of the health care entity if a person, directly or indirectly, acquires voting control of twenty-five percent (25%) or more of any class of voting securities of the health care entity.

(c) For any health care entity, a transaction shall be irrebuttably presumed to involve an acquisition of control of the health care entity if a person, directly or indirectly, acquires voting control of more than fifty percent (50%) of any class of voting securities of the health care entity.

(2) A person seeking to rebut the presumption described in paragraph (1)(b) of this rule shall apply to the Authority for a disclaimer of control determination. Such application must show that the proposed transaction does not (or would not) in fact result in control of the health care entity, or that control would not be changed by the proposed transaction, and must fully disclose all material relationships and bases for control between the disclaimer applicant and the person(s) to which the disclaimer applies, as well as the basis for disclaiming control or change of control. The Authority may determine, after giving persons that have an interest in the Authority's determination notice and opportunity to be heard and after making specific findings of fact to support the determination, that control exists (or would exist) in fact or would be changed by a proposed transaction.

(3) A disclaimer application filed under paragraph (2) of this rule is effective unless, within thirty calendar days after the Authority receives the disclaimer application, the Authority notifies the disclaimer applicant that the disclaimer has been disallowed.

(4) Paragraphs (2) and (3) of this rule do not apply to transactions involving a domestic health insurer or a coordinated care organization. For a domestic health insurer, the disclaimer of affiliation procedure is in ORS 732.568. For a coordinated care organization, the disclaimer of affiliation procedure is in OAR 410-141-5315.

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