
Addressing Health Care Consolidation: Policy Solutions

Jaime King, JD, PhD

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WHAT CAN BE DONE?

- Get the data.
- Enhance antitrust enforcement.
- Pass legislation to support competition and address market deficiencies.
- Enhance agency oversight over health care markets.

USES FOR ALL PAYER CLAIMS DATABASE DATA

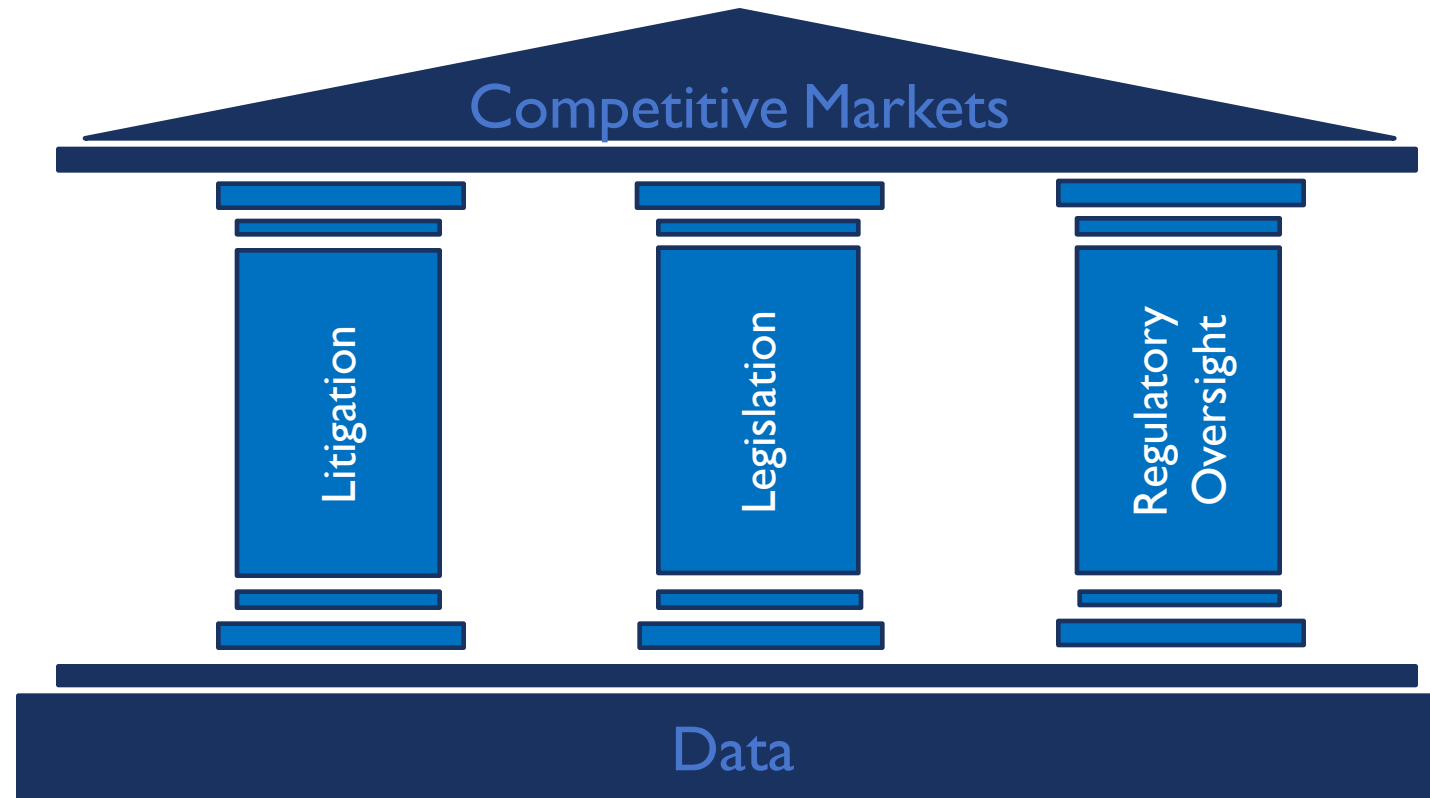
Consumers

- Inform selection of "shoppable" health care services
- Promote comparison of health plans and providers

Policy and Enforcement

- Provide accurate information on functioning of health care markets
- Inform merger analysis and review
- Identify the drivers of cost and track prices post consolidation
- Track utilization and price trends
- Identify low value services
- Inform policy goals and monitor policy initiatives
- Establish benchmark pricing

COMPETITIVE MARKETS NEED SUPPORT



LITIGATION OPTIONS TO ADDRESS MARKET CONSOLIDATION AND CONTROL COSTS

Litigation/ Enforcement	Examples
Pre-Merger Challenge	St. Luke's (ID) Partners/South Shore (MA) Sanford Health (ND)
Conditional Approval and Oversight	Beth Israel/Lahey (MA) UPMC/Highmark (PA) CHI/Dignity (CA)
Challenge Anticompetitive Behavior	Becerra v. Sutter Health (CA) Atrium (NC) CHI/Franciscan (WA)

CONSENT DECREES

A Typology of Consent Decrees	Examples
1. Insurer-Provider negotiation requirements	Require access to binding arbitration Require use of firewalls in contract negotiations
2. Limitations on contract terms	Prices, price increases, or margins
3. Prohibit or require certain contract provisions	Prohibit most favored nations clauses, gag-clauses, anti-steering provisions
4. Prohibit or require conduct	Require release from a noncompete clause Prohibit CON challenges
5. Ensure access to certain populations and certain services.	Ensure access to low-income individuals and/or women's health services

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TERMS OF SETTLEMENTS

**Prohibit All or Nothing
Contracting/Require Isolated
Contracting (Firewalls)**
(CHI Franciscan; Sutter Health)

**Prohibit Anticompetitive
Contract Terms**
(Atrium Health; Sutter Health).

**Divestiture of Assets;
Abandonment of Merger**
(St. Luke's; Sanford Health; CHI Franciscan)

Monetary Relief
Sutter Health - \$575 mil
CHI Franciscan - \$2.5 mil

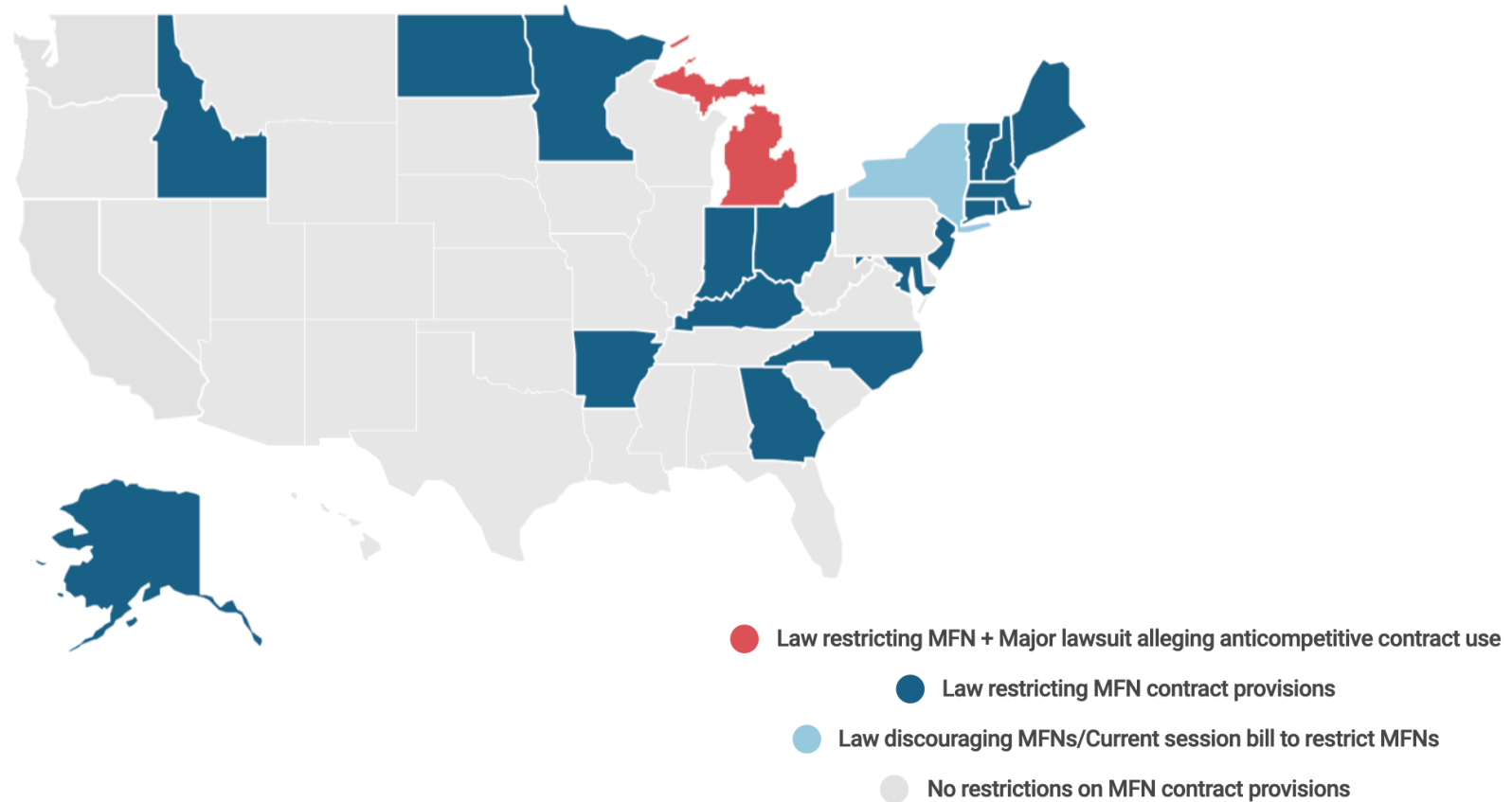
LITIGATION SUPPLEMENTS LEGISLATION



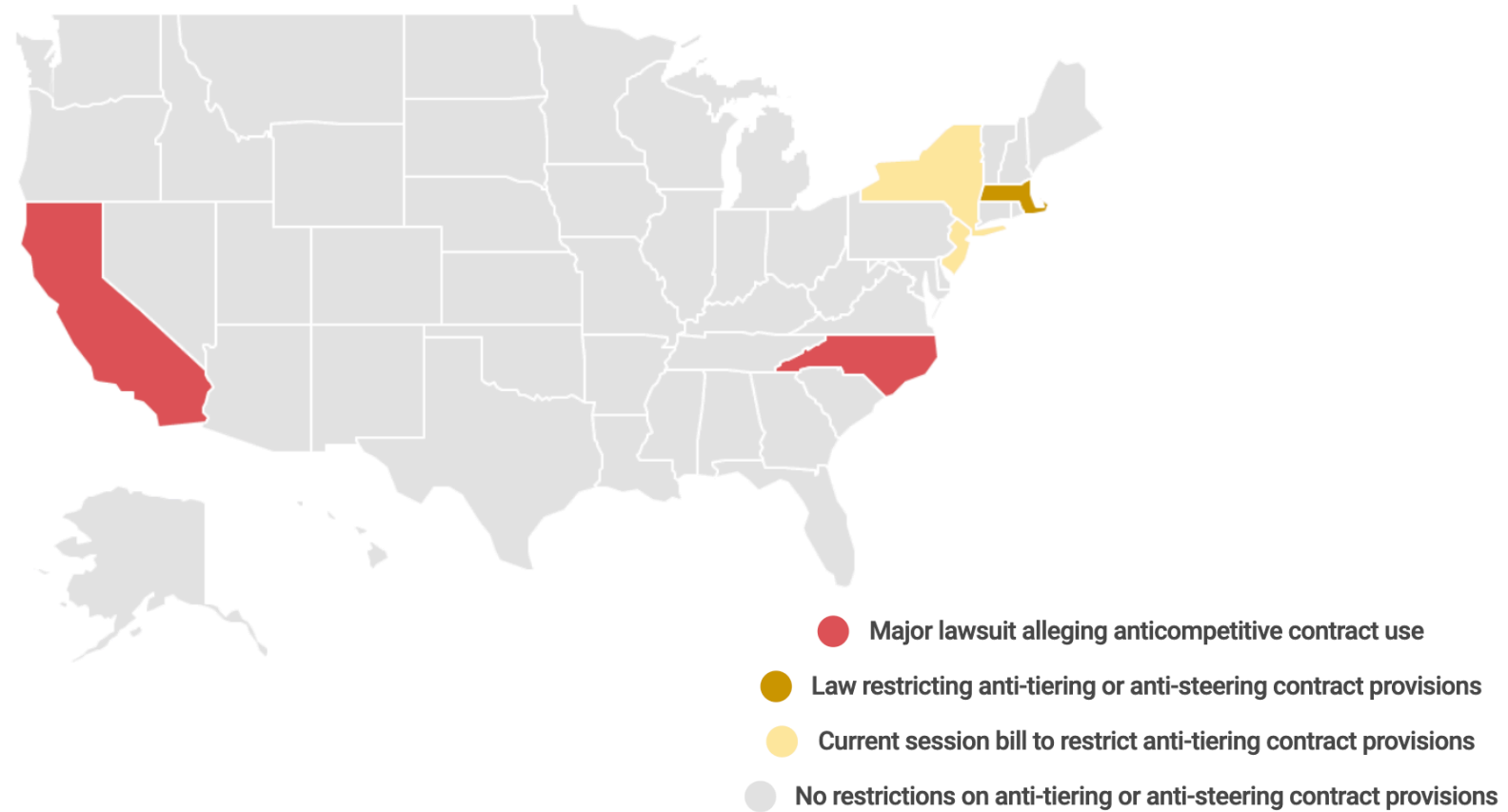
LEGISLATIVE OPTIONS TO ADDRESS MARKET CONSOLIDATION AND CONTROL COSTS

Legislation Type	Examples
Address Specific Market Imperfections	Most Favored Nations Prohibitions Surprise Billing Laws Anti-Steering Prohibitions All or Nothing Prohibitions
Improve Market Function	Price Transparency Laws/APCDs Enhance Merger Review
Market Oversight	Rate Review Rate Caps

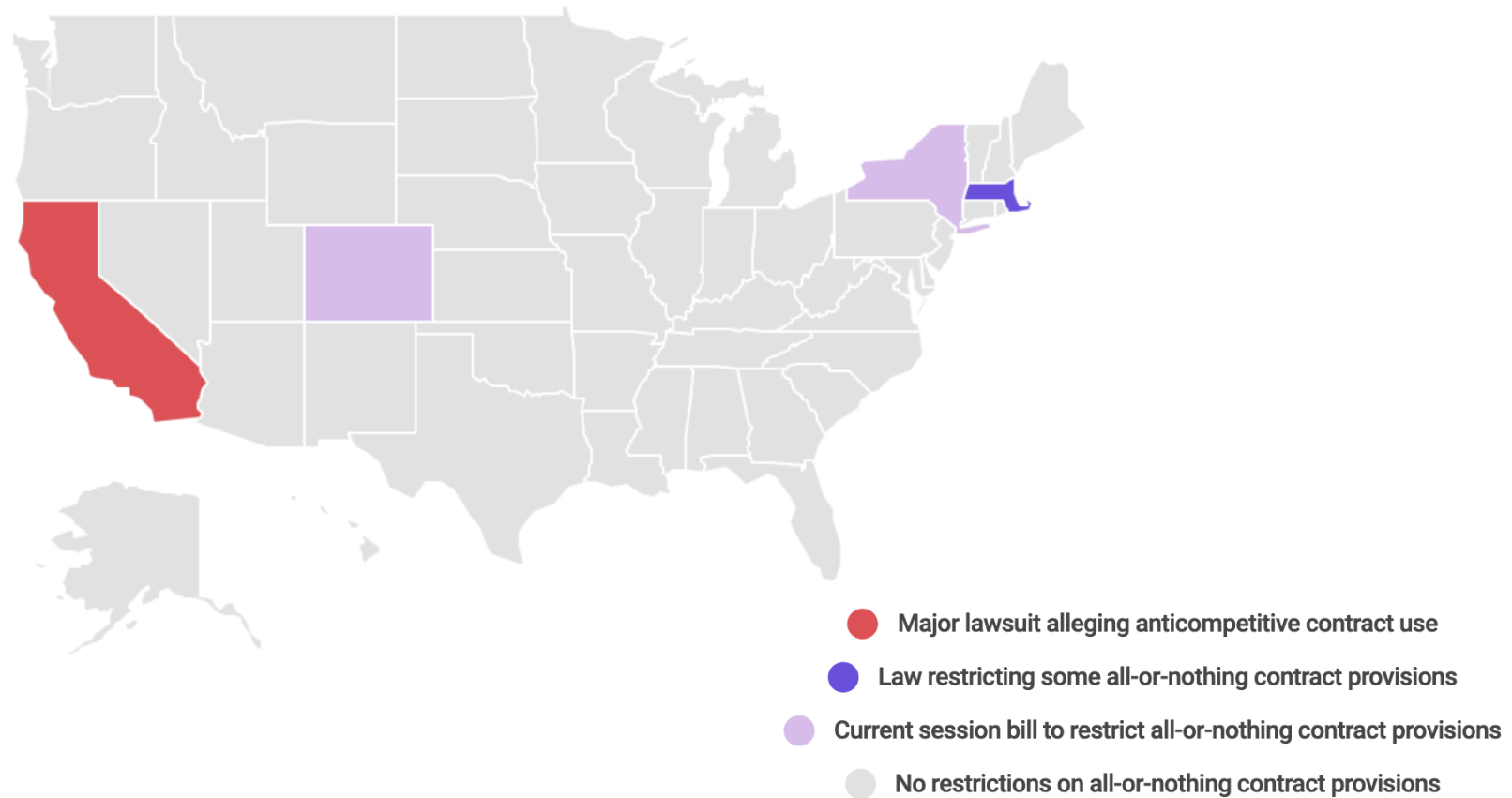
RESTRICTION OF MOST-FAVORED NATION PROVISIONS



RESTRICTION OF ANTI-TIERING OR ANTI-STEERING PROVISIONS IN PROVIDER CONTRACTS



RESTRICTION OF ALL-OR-NOTHING PROVISIONS IN PROVIDER CONTRACTS



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STATE MERGER REVIEW AND OVERSIGHT

- Notice
- Review
- Approval
- Consent Decrees and Conditional Approval
- Post Transaction Oversight

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Preview

State Merger Review Authority

16

5 STATES WITH THE MOST COMPREHENSIVE TRANSACTION REVIEW POLICIES AND PRACTICES

KING, ASSEMBLY HEALTH COMMITTEE MEETING, NOVEMBER 17, 2020

-
- CALIFORNIA
 - CONNECTICUT
 - MASSACHUSETTS
 - PENNSYLVANIA
 - RHODE ISLAND

State Statutory Authority

Provider Merger

Insurance Merger

Statutory Requirement for State Attorney General Review: Click to sort by Requirements

State	Pre-Merger Notice Required	Approval of Merger Required	Review of Health Access, Pricing, or Competition Required
Alabama	—	—	—
Alaska	—	—	—
Arizona	○	—	—
Arkansas	—	—	—
California	○	○	○
Colorado	●	—	○
Connecticut	●	○	—
Delaware	○	—	—
District of Columbia	—	○	—
Florida	—	—	—

Download data

- All Hospitals and Physician Groups
- All Hospitals
- All Hospitals, Merger is Approved if AG Does Not Act
- Nonprofit Hospitals (Acquisition, Merger, or Conversion)
- Limited Review of Nonprofit Hospitals; AG or Court May Decide
- None

CURRENT OVERSIGHT AUTHORITY OVER HEALTH CARE TRANSACTIONS IN CALIFORNIA

State Agency	Statutory Authority	Type of Entity Regulated	Pre-Consolidation Notice and Approval	Conditional Approval Allowed	Review of Competition
AG	Cal. Corp. Code § 5914 et seq.	Nonprofit Hospitals	✓	✓	-
AG	Clayton Act, Section 7 (15 U.S.C. § 18)	All Mergers and Acquisitions	-	✓	✓
CDI	Cal. Ins. Code §§ 1215.1 et seq.	Domestic Insurers	✓	✓	✓
DMHC	Cal. Health & Safety Code §§ 1399.65 et seq.; 1339.70 et seq.*	Health Care Service Plans	✓	✓	✓

NOTICE

TABLE 2: Type of Entities and Transactions Requiring Notification ⁱⁱ

	MA	CT	RI	CA	PA
All Providers and Provider Orgs (<u>Broadest</u>)	AG, S	CON	-	-	-
All Group Practices	-	AG	-	-	-
All Hospitals	DoN	AG*	AG, S	-	-
All Nonprofit Hospital Transactions (including conversions)	-	-	-	AG	AG
Conversions Only** (<u>Most Narrow</u>)	AG^	AG^, S^	AG ⁺ , S ⁺	AG ⁺	-

* If the hospital transaction was large enough to require notification under the federal Hart-Scott-Rodino Act.

** Conversions here are defined as nonprofit hospitals being sold to or acquired by a for-profit entity.

^ Separate notice and review statute governs for this conversion-specific notice.

⁺ Notice and review are encompassed in broader statute for this conversion-specific notice

All Providers and Provider Orgs = All group practices, hospitals, and other providers and provider organizations (i.e. encompasses all other categories in the table and more)

AG = Attorney General

S = State Agency (including HPC, CHIA and the Department of Health units involved in non-CON review of hospital transactions)

CON = State Certificate of Need Agency

DoN = MA Determination of Need Agency

TRANSACTIONS REQUIRING NOTICE

TABLE 3: Type of Transactions Requiring Notification to State Regulatorsⁱⁱⁱ

	MA	CT	RI	CA	PA
Material change to its operations or governance structure of a provider or provider organization	AG, S	AG*	-	-	-
Federal Filing under Hart-Scott-Rodino Act	-	AG	-	-	-
Transfer of ownership or control, generally	DoN	CON**	AG, S	-	-
Transfer of ownership or control, nonprofit corporations	-	AG, S	AG, S	AG	AG

* As it relates to group practice only.

** As it relates to transfer of a healthcare facility or a large group practice (i.e. practice consisting of eight or more physicians) to any entity that is not a physician or physician group.

AG = Attorney General

S = State Agency (including Massachusetts Health Policy Commission, CHIA and the Department of Health units involved in non-CON review of hospital transactions)

CON = State Certificate of Need Agency

DoN = MA Determination of Need Agency

APPROVAL

TABLE 9: Pre-Transaction Approval Authority for Healthcare Transactions

	RI	CT (CON)	CA	CT	MA	PA
Pre-Transaction Approval for All Hospitals	AG, S	HSP	-	-	_*	-
Pre-Transaction Approval for All Physician Groups	-	HSP	-	-	_*	-
Pre-Transaction Approval for Transactions Involving Nonprofit Acquirees Only	-	-	AG	-	_*	-
Pre-Transaction Approval for Conversions Only	-	-	-	AG, S	_*	-
Must File Suit to Challenge Transaction	-	-	-	-	AG	AG

** = Determination of Need needed for transfer of ownership but no significant review takes place unless services or bed capacity of the facility will be changed in being acquired.*

S = State Agency (including the Department of Health units involved in non-CON review of hospital transaction such as Office of Health Strategy)

HSP = Health System Planning Unit, which is Connecticut's Certificate of Need Agency

Notice	Review	Approval and Conditions	Post Transaction Monitoring
Broad Scope of Entities (all providers - hospitals, physicians, clinics, laboratories, etc)	Substantive Review Criteria <ul style="list-style-type: none"> - Competition - Affordability and Prices - Access - Fiduciary Duty - Public Interest 	Require Pre-Transaction Approval Can be tacit or actual depending on Tiered Level	Independent Monitors Paid for by merging entities
Broad Scope of Transactions (mergers, affiliations, “any material change”)	Tiered Level of Review Depending on level of antitrust risk and size of transaction	Judicial Deference to Agency Decisions	Require Annual Compliance Reports
Multiple State Entities should receive notice	Independent Consultants		
Waiting Period	Subpoena Power		

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REGULATORY OVERSIGHT AND RESTRICTIONS

Oversight

- Monitor Market Consolidation Trends in all Healthcare Sectors
 - Horizontal, Vertical, Diagonal, and Cross-market
- Require Cost and Market Impact Statements
- Review Insurer and Provider Rates
- Review Insurer-Provider Contracts for Anticompetitive Contract Terms
- Implement Affordability Standards

Restrictions

- Provider and Insurer Rate Caps if Growth Exceeds Threshold (RI and CO)
- Price Growth Benchmarks (MA and DE)
- Rate Caps (MT and OR SEHBP)

OPTIONS FOR CALIFORNIA

■ **Enhance Consolidation Review**

- Require Notice and Approval for any material change in ownership involving a hospital, physician group, or provider organization.
- Review all Health Care Transactions for the impact to price, competition, and the public interest
- Create or Designate an Agency to Review and Monitor Consolidation Activity and Market Function

■ **Prevent Anticompetitive Contracting Practices**

- Prohibit Anti-Tiering and Anti-Steering Provisions and Most Favored Nations Provisions
- Create or Designate an Agency to Review Health Provider-Insurer Contracts for Anticompetitive language

■ **Enhance Regulatory Oversight**

- Provider and Insurer Rate Review with Rate Approval for Growth Over a Certain Threshold
- Consider Implementing Affordability Standards



Jaime King

*John and Marylyn Mayo Chair in Health Law
University of Auckland, Faculty of Law
Executive Editor
The Source on Healthcare Price and Competition*

The Source on Healthcare Price and Competition
<http://sourceonhealthcare.org>.

Email: Jaime.King@auckland.ac.nz