

HEALTH

HEALTH SYSTEMS BRANCH

DIVISION OF CERTIFICATE OF NEED AND LICENSING

OFFICE OF HEALTH CARE FINANCING

Hospital Financial Reporting

Hospital Licensing Standards: Patient Rights

Hospital Financial Transparency

Adopted Amendments: N.J.A.C. 8:31B-3.3 and 4.6

Adopted New Rules: N.J.A.C. 8:96

Proposed: June 5, 2017, at 49 N.J.R. 1293(a).

Adopted: January 10, 2018, by Christopher R. Rinn, Acting Commissioner, Department of Health (with the approval of the Health Care Administration Board).

Filed: January 10, 2018, as R.2018 d.078, **with non-substantial changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3), **and with the proposed amendment at N.J.A.C. 8:43G-4.1 and the proposed new rules at N.J.A.C. 8:96-1.2 (only the definition of “health benefits plan”), 4, and 9.1(a)7 and 8 not adopted but still pending.**

Authority: N.J.S.A. 26:2H-1 et seq., particularly N.J.S.A. 26:2H-5, 5.1a, 5.1b, 12.50, and 14.

Effective Date: February 5, 2018.

Operative Date: March 7, 2018.

Expiration Dates: June 29, 2018, N.J.A.C. 8:31B;
February 5, 2025, N.J.A.C. 8:96.

Summary of Public Comments and Agency Responses:

The Department received comments from the following:

1. Martin Allen, Esq., Warren Township, NJ;
2. Sean J. Hopkins, Senior Vice President, Federal Relations and Health Economics, New Jersey Hospital Association, Princeton, NJ;
3. Christopher Hughes, Assistant Vice President, Government Relations, Virtua, Marlton, NJ;
4. Suzanne Ianni, President and CEO, Hospital Alliance of New Jersey, Trenton, NJ; and
5. Ann Twomey, President, Health Professionals and Allied Employees, AFT/AFL-CIO, Emerson, NJ.

Quoted, summarized, and/or paraphrased below, are the comments and the Department's responses. The numbers in parentheses following the comments below correspond to the commenter numbers above.

1. COMMENT: A commenter "strongly favors the [proposed new rules at N.J.A.C. 8:96] and the associated amendments" because they "would assist [New Jersey] taxpayers, [assessors], and municipalities, [which subsidize hospitals] through tax exemptions..., in having a better understanding of the financial success of some of these healthcare conglomerates. Many of these large hospital entities not only have total ... revenues in the billions, but, executive salaries and margins in the tens of millions. [Many] times revenues are funneled from the 'not-for-profit' hospital to for[-]profit owned and non-owned for[-]profit companies[, which are financial] facts that these hospitals are reticent ... to disclose The proposed [rulemaking] would greatly

enhance oversight, particularly by requiring the larger multi-hospital systems to break down their financial reports by hospital. [Proposed new N.J.A.C.] 8:96-2.1(a) [would be] very important in requiring this breakdown because it would address the [assertion of system hospitals] that the ‘system is too big to keep such small financial records.’ [This is a frustrating] response when ‘too big’ means tens if not hundreds of millions of dollars. The proposed rule and sanctions [would] be a great help in bringing to light whether or not these hospitals should reform [their] business models to reflect non-profit goals[,] such as by reducing their prices to patients, or even providing economic support for and [the rationale] of their [charge masters]. The public policy goal should be to find a way to provide quality care at better prices. Hopefully, working together[,] the [Department] and [New Jersey] taxing authorities can rein in these abuses. If hospitals are run using a truly [not-for-profit] model[,] medical costs will go down. The [proposal Summary] notes that during meetings with [stakeholders,] the hospitals asserted that the proposed disclosures would create unfair advantages to competitors or bidders. [The commenter has] encountered similar arguments in the hospital litigants seeking protective confidentiality orders from the courts, with only empty assertions of fictional competitors. However, ... increased competition encourages the public policy economic result of reduced medical and hospital costs. When hospitals and providers compete in the market place, the patient consumer wins.” (1)

2. COMMENT: A commenter “supports the overall objectives of the proposed [amendments and new rules, which are] to ‘establish financial transparency standards....’” (3)

3. COMMENT: A commenter states, “[over] the last several years, New Jersey’s healthcare systems have rapidly consolidated. The financial stability of hospitals has improved in [New Jersey,] giving communities ease that healthcare services will be maintained. [This] stability in the market has brought challenges to understand the complexities of hospital operations and finances. It is essential for communities, patients, and workers to have easy access to [hospitals’] audited and unaudited financial statements, so they can better understand how their hospital is investing in care and services. Hospitals in [New Jersey] serve the public [and] rely on financial support from the government and these rules will help to improve accountability onto the hospitals, something some hospitals have attempted to sidestep....

[The commenter] believes the proposed [amendments and new] rules are a step towards greater transparency, accountability, and enforcement [and] will help level the playing field for the citizens of New Jersey as they try to make educated decisions in the critical moments of their health care.” (5)

RESPONSE TO COMMENTS 1, 2, AND 3: The Department acknowledges the commenters’ support of the proposed amendments and new rules.

4. COMMENT: A commenter states that it, and its member hospitals, “are committed to transparency with their patients and community. For years[, New Jersey] hospitals have voluntarily reported charges information and quality data and shared them via a public ... website [that the commenter maintains. The commenter] has developed numerous resources including the Patient Financial Resources Toolkit to assist [its member hospitals] in communicating data and insurance information

effectively with healthcare consumers. Scan hospital and health system websites across the [State] today and you will find voluntary compliance with prior [Department] recommendations on this issue.” (2)

5. COMMENT: A commenter, on behalf of its member hospitals, “[respects and supports] the intent of providing transparency to consumers related to healthcare services and financing.... As all sectors of the healthcare industry seek to work together to achieve the ‘Triple Aim’ – lowered costs, improved patient experience, and improved population health – [the commenter recognizes] that different measures of transparency, both from financial and quality perspectives, have been viewed by some health policy experts as being essential to ensuring a functional market in healthcare.” (4)

RESPONSE TO COMMENTS 4 AND 5: The Department acknowledges the commenters’ assertions of support for and commitment to transparency.

6. COMMENT: A commenter states that the “Department should clarify that the proposed rules apply to acute care hospitals only. The use of the term ‘general acute care hospital’ [at proposed new] N.J.A.C. 8:96-1.1(b) ... and ‘general hospital’ [at proposed new] N.J.A.C. 8:96-1.2 ... may be confusing to rehabilitation hospitals, long term acute care hospitals, and other non-acute and specialty hospital providers.” (2)

RESPONSE: The commenter is correct. The Department intends proposed new N.J.A.C. 8:96 to apply to general hospitals. For the reasons the commenter states, the Department will make a change on adoption at proposed new N.J.A.C. 8:96-1.1(b) to delete the phrase “acute care.”

7. COMMENT: A commenter states that it is “the largest health care system in southern New Jersey,” that it “operates three general acute[-]care hospitals,” and that it “submits quarterly and annual system-wide financial data to the Department as well as the Health Care Facilities Financing Authority as a condition of receiving financing for various projects.” The commenter states that it “also complies with the requirements of the ... MSRB ... by similarly posting this information on the [EMMA®] website....” The commenter states that, because it “operates as a cohesive healthcare system, none of this information is prepared or provided at the hospital level.”

The commenter states that proposed new N.J.A.C. 8:96-2.1 and 2.2 do “not align with the current manner in which New Jersey’s health care systems operate financially. One should not confuse the finances of one hospital as a barometer of how that individual hospital operates within the system’s entire financial plan. The income of one hospital, while potentially not as great as others in the system, should not be misinterpreted as an indicator of hospital financial stability or instability. Health systems ... plan, manage and account for their financial performance at a system level and do not silo individual facilities when accounting for the financial viability of the system as a whole. In addition, for efficiency purposes, [the commenter] provides many support services at an organization-wide level (for example, administration, supply chain, accounting and information technology). These costs are then allocated in some manner to the [commenter’s] individual [system] hospitals. The effect of this allocation to the statement of income results for an individual [system] hospital could lead to a misinterpretation of the results. As such, ... the Department should ... eliminate the

reporting requirements at the system hospital level to reflect more accurately how New Jersey hospital system finances operate. Furthermore, ... this ... will serve to provide better and more meaningful information to residents.”

The commenter suggests, as an alternative to this recommendation, that “a more effective way to achieve the Department’s stated goal of informing the public of the financial viability of hospitals in their community would be to require all health systems to provide annually the following two reports:

[(1)] A public credit report, which provides information about the system, overall credit rating, statistics and financial information. While investors routinely consult these documents to analyze the financial stability of each organization, these reports are also easily understandable by citizens in the community[; and

(2)] An annual audited financial statement, as currently required, including the independent auditor’s opinion. Importantly, the auditor’s opinion represents [the auditor’s judgment] as to whether an organization is either financially viable or of concern, while also including annual financial statements and footnotes. [Requiring] disclosure of the above-described financial reports will address the Department’s desire for increased transparency, while also providing meaningful and useful financial information to New Jersey’s residents about their community hospitals.” (3)

8. COMMENT: A commenter states that the “majority of hospitals in New Jersey are part of larger health systems comprised of multiple entities[, which] may include other acute[-]care hospitals, specialty hospitals, post-acute[-]care providers, medical groups, foundations, etc. Currently, 80 percent of hospitals in [New Jersey] are affiliated with systems that include two or more acute[-]care licenses. [The] proposed

[amendments and new rules] should reflect the changing environment as a result of system formations over the last decade.

In addition, some hospitals with multiple acute[-]care campuses operate under a single Medicare provider number or tax ID. Their annual audited statements reflect the activity at all campus locations; breakouts for individual campuses are not available.

[The commenter] recommends that the [Department] revise ... proposed [new N.J.A.C. 8:96-2.1(a)] to reflect the complexity of health systems. The Department should accept audited financial statements for hospitals and health systems at the level at which they are prepared and audited.”

With respect to proposed new N.J.A.C. 8:96-2.2, the commenter states that the “Department already requires hospitals to report five ‘flash’ financial indicators on a monthly basis as part of its early warning system. In addition, ... financial information is provided quarterly to the New Jersey Health Care Facility Financing Authority. This information should already provide the [State] with insight into the financial stability of each hospital.

Unlike annual audited financial statements, there is a lack of standardized criteria for the preparation of quarterly unaudited statements that may result in inconsistencies across hospitals.... If posted publicly, the unstable nature of quarterly unaudited financials may result in public data that is more misleading than informative, leading to more confusion and concern than clarity. A hospital or health system’s performance may fluctuate significantly from quarter to quarter. While some fluctuations may be easily explained (for example, seasonal variations at a hospital located near the Jersey shore), others are more complex. Even if accompanied by the optional explanatory

statement, quarterly unaudited financial data is difficult to present in a way that would be meaningful to members of the hospital's community. [The commenter recommends wariness] of any unintended consequences of posting preliminary data without sufficient context. It would be very detrimental, for example, if consumers made treatment decisions or career choices based on preliminary, unaudited information.

[The proposed] requirement to submit and post quarterly unaudited financial statements would be administratively burdensome for hospitals to comply with, and would require some hospitals to incur additional costs.

Unless a hospital is already required to produce quarterly unaudited financial statements for other purposes, [the commenter] recommends that the [Department] eliminate the proposed requirement for all hospitals to submit and post quarterly unaudited financial statements. For hospitals and health systems that already produce such statements, the Department should accept the quarterly unaudited financial statements at the level at which they are prepared and a link to this documentation where it exists in other settings." (2)

9. COMMENT: A commenter states that "data supports [the assertion] that the means of transparency must be easily understandable and meaningful ... to positively impact consumer behavior. [Many] of the proposed measures, on top of not providing easily understandable and meaningful data, are also duplicative and could cloud the perception of better sources for hospital financial data." The commenter requests that the Department withhold adoption of, and/or modify, the proposed amendments and new rules, and rescind the proposed requirement that hospitals submit and post their quarterly, unaudited financial statements. The commenter states that, in so requesting,

“[this] is all not to say that transparency is not a goal that all stakeholders should seek to achieve; it is to say that study after study has proven that ... to be effective, transparency measures must be meaningful, easy to understand for consumers, and communicated in such a manner that includes important contextual information. Additionally, transparency measures must be paired with consumer assistance to ensure they are effectively utilized.

Quarterly, unaudited financial statements do not meet any of these peer-reviewed requirements for providing useful consumer information. They are not meaningful to the public[. They] are internal, proprietary working documents and subject to changes when compared to audited annual financial statements. There could be differing information between the audited and unaudited statements which could only lead to further confusion among consumers.

The quarterly, unaudited statements are not easy to understand. The same is true for annual statements[,] but especially so for quarterly, unaudited statements. One would need a background in accounting or financial data to understand them, which would make them only useful to external groups with the resources to interpret them[,] not the general public.

Additionally, quarterly, unaudited financial statements lack the sort of contextual information needed to make them useful. In fact, the data in those statements is available in a much better and more meaningful format on annual audited statements[,] which are already posted on hospitals’ websites ... and on IRS 990s for non-profit hospitals.

For those reasons, [the commenter] takes issue with the proposed practice of making sensitive information about business operations public. Quarterly, unaudited financial statements would provide very little or no value to consumers, and would only help to bolster competitive interests that have the resources and expertise to actually interpret and use them. Making them public would have virtually no impact on consumers' behavior in the marketplace, or understanding of hospital financing.

[The commenter requests that] the Department ... rescind ... proposed [new N.J.A.C.] 8:96-2.2.”

With respect to proposed new N.J.A.C. 8:96-2.1 and 2.2, the commenter requests that the Department reduce the reporting burden on hospitals by reviewing “the availability of data currently submitted to the Department..., the [Internal Revenue Service (IRS)], and other public entities [in comparison to the proposed new] rules to reduce duplicative requirements.” The commenter states that “New Jersey’s safety net hospitals are already subject to a host of reporting requirements. They submit cost report data to [the Centers for Medicare and Medicaid Services] and the Department[, which data] are publicly accessible through ... requests [for public records], while simultaneously working with [Federally] mandated independent auditors to ensure the accuracy of Medicaid disproportionate share hospital cost and payments. They post their annual audited statements online[,], submit tax or tax-exempt data to the IRS[, and] submit ongoing financial data to the Health Care Facilities Financing Authority.” The commenter requests “that the Department look at the data already being collected and reported and determine whether reporting rules that go above and beyond those requirements are necessary, or whether meaningful data is already being collected and

available. With more limited resources than other hospitals, New Jersey's safety net hospitals feel the impact of new reporting requirements more acutely than others." The commenter requests "that the Department ... take into account the way consolidated health systems currently collect and report financial data, and work to reduce new administrative burdens on those systems and the hospitals within them. [Proposed new N.J.A.C. 8:96-2.1 and 2.2 would mandate adherence to] specific types of accounting that do not recognize how some systems currently report their financials. If a health system currently collects and provides consolidated financial data, then that should be sufficient to meet the Department's transparency requirements, rather than hospital-specific financial data." (4)

RESPONSE TO COMMENTS 7, 8, AND 9: The Department disagrees with the assertions that the Department should (1) limit the required submissions to annual public credit reports and audited annual financial statements as these would serve the "goal of informing the public of the financial viability of hospitals in their community"; (2) not require hospitals and hospital systems to submit quarterly unaudited financial statements to the Department; and (3) not require the submission of statements of operations for system hospitals.

Not all hospitals obtain public credit reports and, as the financial crisis caused by the failure of highly rated mortgage-backed securities demonstrated, credit reports are not always truly indicative of financial strength. The Department already requires, and would continue to require, hospitals and hospital systems to submit their audited annual financial statements pursuant to N.J.A.C. 8:31B. Moreover, annual audited financial statements typically are not available until at least 120 days after the fiscal year. In the

interim, the Department's review of the unaudited quarterly financial statements of hospitals and hospital systems would facilitate the Department's assessments of their financial conditions and would confirm and corroborate other monthly and quarterly financial information that hospitals and hospital systems submit to comply with laws promulgated in 2008, in response to a series of threatened and actual unplanned hospital closures attributed to financial crises. See N.J.S.A. 26:2H-5.1, 5.1a, 5.1b, 12.50, 12.51, and 18.74 through 18.78.

The Department needs system hospitals' statements of operations to fulfill its important duties for planning and assuring health care access to the residents of New Jersey. The Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 et seq., reposes in the Department "the central responsibility for the development and administration of the State's policy with respect to health planning, hospital and related health care services and health care facility cost containment programs," and empowers the Commissioner of Health "to inquire into health care services and the operation of health care facilities and to conduct periodic inspections of such facilities with respect to ... the adequacy of financial resources and sources of future revenues," and, with the approval of the HCAB, to adopt rules "to effectuate the provisions and purposes of this act," and to require health care facilities to "furnish to the Department ... such reports and information as it may require to effectuate the provisions and purposes of this act" N.J.S.A. 26:2H-1 and 5.

The Department disagrees with the assertion that proposed new N.J.A.C. 8:96-2.1 and 2.2 would require reporting that (1) is duplicative of hospitals' existing, readily available reporting to the Federal Internal Revenue Service and the Centers for

Medicare and Medicaid Services; and (2) does not reflect existing financial information tracking methods that systems operating with multiple facilities and campuses use.

The Federal government may authorize systems to report financial data for their multiple component facilities in a unified submission, such as under a single Centers for Medicare and Medicaid Services (CMS) provider number or tax identification number. However, as part of its obligation to oversee and ensure continuing regional access to needed health care services through the certificate of need process, the Department licenses individual hospitals at different locations as separate entities, regardless of the existence of a system to which they might belong. Indeed, relocation of a hospital “immediately void[s]” its existing license. N.J.A.C. 8:43G-2.5(d). The Health Care Facilities Planning Act obliges the Department, in issuing certificates of need, to determine, among other factors, that issuance of a CN “is necessary to provide required health care in the area to be served, can be economically accomplished and maintained, will not have an adverse economic or financial impact on the delivery of health care services in the region or Statewide, and will contribute to the orderly development of adequate and effective health care services.” N.J.S.A. 26:2H-8. The Department’s collection of facility-specific, in addition to system-wide, financial information is critical to its oversight of location-specific need issues that each system hospital implicates. If a system hospital closes due to financial issues, the closure can negatively affect a community’s access to health care services at that location, even if the system continues to operate facilities at other locations.

Analysis of the activities of individual facilities as separate entities, regardless of whether they comprise a system, is also important to the Federal government. For

example, the Internal Revenue Service measures a nonprofit community hospital's eligibility to be tax-exempt by hospital facility. See 26 U.S.C. § 501(r)(2)(B), which provides in part: "If a hospital organization operates more than 1 hospital facility – (i) the organization shall meet the requirements of this subsection separately with respect to each facility, and (ii) the organization shall not be treated as described in [26 U.S.C. § 501](c)(3) with respect to any such facility for which such requirements are not separately met."

A commenter's assertion, that "[h]ealth systems ... plan, manage and account for their financial performance at a system level and do not silo individual facilities when accounting for the financial viability of the system as a whole," does not reflect the Department's experience, which is that hospital systems regularly track the financial performance of each of their system hospitals. Recent New Jersey history (since 2000) has borne out that hospital systems not only monitor the financial performance of each of their system hospitals but act on that monitoring. Despite being part of a system (including some systems that were financially stable), hospital systems have closed system hospitals that consistently underperformed financially, for example, Columbus Hospital (Newark), Greenville Hospital (Jersey City), Hospital Center at Orange, Irvington General Hospital, Muhlenberg Regional Medical Center (Plainfield), St. Francis Hospital (Jersey City), St. James Hospital (Newark), South Jersey Hospital (Millville), Union Hospital, and West Jersey Hospital (Camden).

The Department views it as unlikely that allocation of a system's overhead expenses would lead to confusion or misinterpretation of a hospital's financial information in the statement of operations of a system hospital. The Department is

confident that hospital system financial management teams are sufficiently knowledgeable and sophisticated to be able to fairly and logically allocate those overhead expenses and to communicate those allocations clearly in footnotes to the statement of operations.

The Department disagrees with the assertion that proposed new N.J.A.C. 8:96-2.1 and 2.2 fails to take into account the reporting burden, particularly on “safety net” hospitals, that is, those that serve a disproportionate share of indigent and Medicaid patients. The Department further disagrees with the recommendation that it rely instead on other available information such as Medicare cost reports, and information provided to the Internal Revenue Service.

The Department was careful to require hospitals to submit data in forms that they already prepare for other purposes, in the form of annual audited financial statements and quarterly unaudited financial statements. It is correct that, if a health care system does not maintain a separate statement of operations for each of its system hospitals, the proposed new rule would require the preparation of additional information. However, in the Department’s experience, as described above, this is unlikely. Nonetheless, the Department believes the burden to health care systems of producing a separate statement of operations for each system hospital is outweighed by the need for the information to enable the Department to fulfill its health care access planning obligations.

The Department disagrees with the assertion that public posting on hospital websites of quarterly unaudited financial statements and/or unaudited statements of operations would be either overly burdensome or costly to hospitals. All publicly traded

for-profit hospital systems post their quarterly unaudited financial statements on the EDGAR system, and all New Jersey hospitals that are financed with publicly issued taxable or tax-exempt bonds post their quarterly unaudited financial statements on the EMMA® system.

However, for purposes of this rulemaking, the Department will accept the commenters' assertion that, given the preliminary and unaudited nature of financial information contained in unaudited financial statements and unaudited statements of operations, public posting thereof, in limited cases, may be misleading, confusing, or of limited use to laypersons. Therefore, in deference to the commenters' concerns, and without prejudice to the Department's reproposal of these or similar rules in the future as the Department's experience with N.J.A.C. 8:96 develops, the Department will not adopt proposed new N.J.A.C. 8:96-2.2(b) (which would have required the posting of unaudited quarterly financial statements on a hospital's website), (c) (which would have authorized the posting of caveats to accompany the posting of unaudited statements to highlight the unaudited and nonfinal nature thereof), and (d) (which would have established a procedure to apply for waiver of the posting obligation), and 9.1(a)4 (which would have established the enforcement remedy associated with noncompliance with the posting obligation).

Except as described above, and for the reasons stated above, the Department will make no changes on adoption in response to the comments.

10. COMMENT: A commenter requests that the Department "clarify the purposes for which the dedicated e-mail address, financial.reports@doh.nj.gov, should be used

[by stating] that this e-mail be used by hospitals to submit to the Department all information” of which the proposed amendments and new rules would require submission. (2)

RESPONSE: The definition of the term, “Department,” at proposed new N.J.A.C. 8:96-1.2, establishes “the contact information for submissions that this chapter requires,” specifying therein the e-mail address to which the commenter refers. As the rule as proposed indicates, the provision the commenter suggests, a change on adoption would be unnecessary. Therefore, the Department will make no change on adoption in response to the comment.

11. COMMENT: A commenter expresses “concern [with respect to] proposed new ... N.J.A.C. 8:96-2.2(d)[, which would] allow hospitals to apply for a waiver to permit not posting the unaudited quarterly statements. While [the commenter understands] the reasoning of unfair advantage, and the fluidity in unaudited financials, [the commenter does] not agree with the conclusions made by the hospital stakeholders. [The] Department [should] reconsider this provision, or at the very least provide a stringent list of acceptable reasons for the waiver request in the regulations so that the public may be better informed about this potential process.” (5)

Note: The Department received a letter dated August 16, 2017, that is, after the close of the public comment period, from the Honorable Loretta Weinberg, Senate Majority Leader (Legislative District 37), expressing support for the comments of Commenter 5, and emphasizing the Senator’s dissatisfaction with “permitting hospitals to apply for a waiver to permit not posting their unaudited quarterly statements.”

RESPONSE: Executive Order Number 2 (Governor Christie, January 20, 2010), at § 1c, requires State agencies to establish “rules for ‘waivers’ [that] recognize that rules can be conflicting or unduly burdensome and [to] adopt regulations that allow for waivers from the strict compliance with agency regulations and such waivers shall not be inconsistent with the core missions of the agency.” Therefore, the Department’s proposed establishment of a waiver provision would have been appropriate and consistent with its obligations pursuant to Executive Order Number 2.

However, as stated in the Response to Comments 7, 8, and 9, and for the reasons stated therein, and without prejudice to future rulemaking in this regard, the Department is not adopting proposed new N.J.A.C. 8:96-2.2(b), (c), or (d), thus mooting the commenter’s concern as to the appropriateness of granting waivers from the unadopted provisions. Therefore, the Department will make no change on adoption in response to the comments.

12. COMMENT: A commenter states, “New Jersey hospitals have been, and will continue to be, compliant with the statutory requirement [at N.J.S.A. 26:2H-12.50] to host at least one public meeting each year despite sparse public attendance at these meetings. Hospitals have found that the [State]-mandated agenda topics do not attract attendees. Those hospitals and health systems that have been successful in attracting public attendees have done so by using creative approaches like combining the meeting with an open house, health fair or other event that engages public members in their health. While financial performance is discussed and provided to attendees as directed by the Department’s earlier voluntary recommendations, hospitals and health systems

have learned through years of experience with these meetings that consumers are most interested in things such as new programs or services, quality and patient safety, new clinical affiliations and potential merger activity. As such, [the commenter] recommends the Department remove the proposed requirement [at new N.J.A.C. 8:96-3.1] that hospitals must hold their public meetings within 60 days of submitting audited financial statements. With the proposed posting of audited financial data on the hospital's website, and the availability of audited financial statements at the annual meeting, the public will have ample opportunity to observe and monitor the economic viability of their local hospital. In addition, since hospitals are required by law to hold a public meeting once a year, the financials provided at such meetings will be the most recent audited statements available (typically less than a year old). Linking the timing of the annual meeting to the release of audited financial statements is arbitrary and unnecessary and could disrupt the success some hospitals and health systems have had in attracting attendees to these meetings." (2)

RESPONSE: The Department will accept the commenter's assertion that some annual meetings that hospitals and health systems convene pursuant to N.J.S.A. 26:2H-12.50 have been sparsely attended. One purpose of the proposed new rule at N.J.A.C. 8:96-3.1, requiring a hospital to hold its annual meeting within 60 days of the release of its audited financial statements, is to use the availability of relevant and current information to draw community members to the meetings.

Hospitals would continue to be able to attract attendees using incentives. The commenter does not describe how the proposed new rule at N.J.A.C. 8:96-3.1 would hinder those efforts. The Department believes that requiring hospitals to hold their

required annual meetings within 60 days of the release of their audited financial statements, and to make those statements available to meeting attendees, would promote the intended purpose of N.J.S.A. 26:2H-12.50, that is, to enhance community involvement in hospital activities and oversight, and to enable the public to inquire as to hospitals' financial status based on up-to-date, meaningful information.

For the foregoing reasons, the Department will make no change on adoption in response to the comment.

13. COMMENT:A commenter states that it "is important that the [proposed new rules at N.J.A.C. 8:96] come with enforcement remedies such as provided but ... the fine schedule [should] have more stringent penalties. Fining a hospital or system \$[50.00] or \$100[.00] dollars a day for not posting its audited financial statements only becomes a cost of doing business rather than a deterrent. If the fines were calculated in relation to the annual profit or revenue, that may be more effective than the fine schedule contained in the proposed regulations." (5)

RESPONSE: Proposed new N.J.A.C. 8:96-9.1 would establish enforcement remedies and procedures that are consistent with the existing enforcement remedies and procedures that are applicable to all licensed healthcare facilities at existing N.J.A.C. 8:31B-3.3. The proposed penalty amounts are comparable to those applicable to similar prohibited conduct at N.J.A.C. 8:31B-3.3(c). For example, proposed new N.J.A.C. 8:96-9.1(a)2 would establish of a fine of \$100.00 per day until a hospital achieves compliance with the obligation to post, on the hospital's website, its annual audited financial statements, which would be comparable to the penalty at existing

N.J.A.C. 8:31B-3.3(c) for late submission of a hospital's annual audited financial statement. Likewise, proposed new N.J.A.C. 8:96-9.1(a)3 would establish of a fine of \$50.00 per day until a hospital achieves compliance with the obligation to submit to the Department its quarterly unaudited financial statements, which would be comparable to the penalty at existing N.J.A.C. 8:31B-3.3(c) for late submission of a hospital's quarterly financial and utilization data specified in N.J.A.C. 8:31B-3.3(b). For the foregoing reasons, the Department will make no change on adoption in response to the comment.

14. COMMENT: A commenter states that it "is unfortunate the Department did not include the recommendation from the [*Transparency Report*] for requiring reportage of contracts with related parties, self-dealing, or conflicts of interest. As the [*Transparency Report*] states, 'Self-dealing and conflicts of interest can lead to losses that endanger the health care system, compromise access to hospital care, and bring into question the stewardship of public funds.' It continues with stating that related[-]party [transactions] could be entered into for fraudulent purposes. Given that the Department is aware of this conflict[,] responsible action would dictate the necessity for including this issue in the proposed [rulemaking].

Additionally, [the commenter] would have liked to have seen a more definitive approach to the reportage of sale-leaseback agreements that would strengthen what was recommended in the [Transparency Report at 19-20]. Reporting such a transaction only to the Department and at its annual public meeting hardly holds the hospital accountable to the public. The proposed [rulemaking] would serve the public better if it [required] the healthcare entity to make public the sale-leaseback process." (5)

Note: The Department received a letter dated August 16, 2017, that is, after the close of the public comment period, from the Honorable Loretta Weinberg, Senate Majority Leader (Legislative District 37), expressing support for the comments of Commenter 5, and emphasizing the Senator's dissatisfaction with the "lack of inclusion for reporting contracts with related parties, self-dealing or conflicts of interest."

RESPONSE: The Department's rulemaking to implement some of the *Transparency Report* recommendations does not preclude its subsequent promulgation of additional rulemaking to implement other recommendations contained in the *Transparency Report*. The Department is using a phased approach, so that the promulgation of rules to implement some *Transparency Report* recommendations does not have to bide the Department's consideration of, and development of rulemaking to implement, other recommendations contained in the *Transparency Report*. The Department is developing rulemaking to implement the *Transparency Report* recommendations that the commenter identifies.

For the foregoing reasons, the Department will make no change on adoption in response to the comment.

Federal Standards Statement

The adopted amendments and new rules establish standards for hospitals to file with the Department and post to their websites their financial statements prepared in accordance with generally accepted accounting principles (GAAP). Some or all of the hospitals that are subject to the adopted amendments and new rules, depending on their respective corporate or business structures, are subject to standards that the

United States Securities and Exchange Commission (SEC) and the Municipal Securities Rulemaking Board (MSRB) administer governing the required content of corporate utterances, such as financial statements. See 15 U.S.C. §§ 78m and 78o and 17 CFR 240.15c2-12 and 249.310. The adopted amendments and new rules are consistent with those laws inasmuch as the SEC and the MSRB recognize GAAP as an authoritative standard for the presentation of financial statements. See SEC, Commission Guidance Regarding the Financial Accounting Standards Board's Accounting Standards Codification, Release Nos. 33-9062A, 34-60519A, and FR-80A (August 19, 2009; effective August 25, 2009), available at <http://www.sec.gov/rules/interp/2009/33-9062a.pdf>; MSRB Rule G-32; MSRB Notice 2010-15 (June 2, 2010), available at <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2010/2010-15.aspx>; MSRB Notice 2010-32 (August 27, 2010), available at <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2010/2010-32.aspx?n=1>; and United States Government Accountability Office, "Dodd-Frank Wall Street Reform Act: Role of the Governmental Accounting Standards Board in the Municipal Securities Markets and Its Past Funding," GAO-11-267R (January 18, 2011), available at <http://www.gao.gov/products/GAO-11-267R> ("GASB establishes standards of accounting and financial reporting for state and local government[s of the United States of America]. Established in 1984 as an operating component of the Financial Accounting Foundation ..., GASB is recognized by the American Institute of Certified Public Accountants as the body that sets generally accepted accounting principles (GAAP) for state and local governments.").

Except as described above, there are no Federal standards applicable to the adopted amendments and new rules. The Department is not adopting the amendments and new rules under the authority of, or to implement, comply with, or participate in a program established under Federal law or a State law that incorporates or refers to a Federal law, standard, or requirement. The Department adopts the amendments and new rules under the authority of N.J.S.A. 26:2H-1 et seq., particularly at 26:2H-5, 5.1a, 5.1b, 12.50, and 14. Therefore, a Federal standards analysis is not required.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

8:96-1.1 Purpose and scope

(a) (No change from proposal.)

(b) This chapter applies to general *[acute care]* hospitals that the Department licenses pursuant to the Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 et seq.

8:96-2.2 Issuance*[,]* ***and*** submission to the Department*[, and internet posting]* of unaudited quarterly financial statements*[; waiver]*

(a) (No change from proposal.)

*[(b) Subject to (c) and (d) below, within the earlier of either 15 days of the submission thereof to the Department pursuant to (a) above, or 60 days of the close of a reporting period quarter, a hospital shall post on the home page of its website direct links to its cumulative unaudited quarterly financial statements or, in the case of a health care system that does not issue hospital-specific unaudited quarterly financial statements for

each of its system hospitals, an unaudited quarterly statement of operations or income, with respect to the system hospital:

1. As a stand-alone document; or
2. At the page upon which they appear in either the EMMA® or the EDGAR

systems.

(c) Each hospital can elect to post, with or adjacent to the financial statements, or, if applicable, the statement of operations or income, that it posts pursuant to (b) above, an accurate statement that highlights and describes the unaudited nature thereof and any caveat associated therewith.

(d) A hospital and/or health care system can elect to apply to the Department for a waiver of compliance with (b) above on the grounds that posting unaudited financial statements and/or, if applicable, an unaudited statement of operations or income, would conflict with applicable filing and disclosure standards, or other applicable law.

1. To apply for a waiver pursuant to (d) above, a hospital and/or health care system shall submit a waiver application to the Department using form CN-28, which is available at N.J.A.C. 8:37 Appendix B and the Department's forms page at www.nj.gov/health/forms:

i. At least 90 days prior to the date by which this section otherwise would require posting of unaudited quarterly financial statements or, if applicable, an unaudited quarterly statement of operations or income; and

ii. That contains citations to the applicable standards and/or laws with which the applicant asserts posting would conflict, and a description of how posting would conflict therewith.

2. The Department will grant a waiver application if it determines that posting the unaudited quarterly financial statements or, if applicable, the unaudited statement of operations or income, would, or is likely to, conflict with applicable filing and disclosure standards, and/or other applicable law.]*

SUBCHAPTERS *[5]* *4* THROUGH 8 (RESERVED)

8:96-9.1 Enforcement remedies and procedures

(a) In accordance with applicable enforcement procedures, and in addition to available enforcement remedies at N.J.A.C. 8:43E-3, and subject to (b) below, the Department may assess civil monetary penalties pursuant to N.J.S.A. 26:2H-13 and 14 for violations of this chapter as follows:

1. – 3. (No change from proposal.)

[4. For failure to post unaudited quarterly financial statements or, if applicable, an unaudited quarterly statement of operations or income, in accordance with N.J.A.C. 8:96-2.2(b), and subject to the Department having granted a waiver pursuant to N.J.A.C. 8:96-2.2(d), \$50.00 per day until compliance occurs;]

[5.] *4.* For failure to convene a public meeting pursuant to N.J.A.C. 8:96-3.1, \$100.00 per day until compliance occurs; ***and***

[6.] *5.* For failure to make available, to attendees at the public meeting convened pursuant to N.J.A.C. 8:96-3.1, copies of audited annual financial statements and/or, if applicable, the audited annual statement of operations or income with respect to a system hospital, in accordance with that section, \$1,000 per violation*[*]**.*

(b) (No change from proposal.)