

## INITIAL STATEMENT OF REASONS

### SUMMARY OF THE PROPOSED REGULATIONS

This regulatory action establishes the qualifications, powers, and duties of a temporary manager appointed by the California Department of Public Health (Department) to manage a long-term health care facility when the facility has serious quality of care and/or financial difficulties, and the current facility ownership does not have the ability to correct the deficiencies. This regulatory action specifies: the process for applying for placement on the list of potential temporary managers; the process by which the Department makes an appointment from the list; the duties of the licensee upon appointment of a temporary manager; and the powers, duties, and financial reporting requirements of the temporary manager.

### POLICY STATEMENT OVERVIEW

*Problem Statement:* The Department appoints temporary managers pursuant to its authority in Health and Safety Code (HSC) section 1325.5. However, regulations are needed to provide clarity and specificity as to the application process and the qualifications, powers, and duties of temporary managers.

*Objectives (Goals):* The broad objectives of this proposed regulatory action are to:

- Protect the health and safety of long-term health care facility residents and minimize the effects of transfer trauma.
- Create uniform standards for the appointment of temporary managers.
- Clearly delineate authority between a temporary manager and the facility's licensee.
- Provide improved oversight over disbursements of state funds used to operate facilities during periods in which a temporary manager is in place.

*Benefits:* The expected benefits of this proposed regulatory action include:

- Ensuring that standards of care are maintained throughout a temporary manager's appointment.
- Reducing the risk of confusion, conflict, or harm to residents during the appointment period, including the risk of transfer trauma.
- Clarifying the criteria applicants must satisfy to qualify to serve as a temporary manager.
- Streamlining the application and selection process for potential temporary managers.
- Ensuring transparency between the Department, applicants, and long-term health care facilities regarding the application and appointment process.
- Increasing the pool of qualified temporary managers.
- Ensuring transparency regarding disbursements of funds from the Health Facilities Citation Penalties Account used to operate facilities once other facility revenues have been exhausted.

## **BACKGROUND/AUTHORITY**

The Department is authorized to adopt and enforce regulations pursuant to HSC sections 1275 and 131200 as may be necessary for the execution of its duties. Pursuant to HSC section 131051(b), the Department is charged with the licensure and regulation of long-term health care facilities.<sup>1</sup>

As part of its regulatory authority, the Department may appoint a temporary manager of a long-term health care facility under either of the following circumstances: when residents are in immediate danger of death or permanent injury due to the facility's failure to comply with state or federal requirements applicable to the operation of the facility; or when, as a result of a change in the status of the license or operation of the facility, the facility is required to comply with HSC section 1336.2,<sup>2</sup> the facility fails to comply with HSC section 1336.2, and the Department determines that the facility is unwilling or unable to meet the requirements of HSC section 1336.2. This authority enables the Department to take quick, effective action to protect the health and safety of residents when the facility itself is not in a position to do so, and to minimize the effects of transfer trauma that often accompany the abrupt transfer of elderly and disabled residents (HSC section 1325.5(a)).

A temporary manager is the person, corporation, or other entity appointed as the substitute facility manager or administrator with authority to hire, terminate, or reassign staff, obligate facility funds, alter facility procedures, and manage the facility to correct the deficiencies identified in the facility's operation (HSC section 1325.5(b)). It is the temporary manager's duty to take all necessary steps and make best efforts to eliminate the immediate danger of death or permanent injury to residents or complete the transfer of residents to alternative placements (HSC section 1325.5(d)). To be successful, a temporary manager must have sufficient experience managing facility operations in compliance with applicable state and federal requirements and mitigating risk to residents.

Appointment of a temporary manager is made pursuant to an agreement between the temporary manager and the Department that outlines the circumstances under which the temporary manager may expend facility funds (HSC section 1325.5(e)(2)). Once all facility funds have been exhausted, the Department may use funds from the Health

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<sup>1</sup> As defined in HSC section 1326, a long-term health care facility means any skilled nursing facility, intermediate care facility, intermediate care facility/developmentally disabled, intermediate care facility/developmentally disabled habilitative, intermediate care facility/developmentally disabled-nursing, intermediate care facility/developmentally disabled-continuous nursing, or congregate living health facility licensed pursuant to Chapter 2, Division 2 of the Health and Safety Code.

<sup>2</sup> HSC section 1336.2 sets forth the steps a long-term health care facility must take before residents are transferred due to any change in the status of the facility's license or operation of the facility, including facility closure or voluntary or involuntary termination of a facility's Medi-Cal or Medicare certification.

Facilities Citation Penalties Account to operate the facility and pay the temporary manager's salary or fee<sup>3</sup> (HSC section 1325.5(l)).

HSC section 1325.5 prescribes the general qualifications and duties of a temporary manager but also directs the Department to adopt regulations (HSC section 1325.5(m)). The Department recognizes the need for more specificity with regard to these qualifications as well as a standardized application process for temporary managers. The Department also recognizes the need for increased accountability and transparency with respect to payments made to temporary managers using state funds from the Health Facilities Citation Penalties Account. With this in mind, the proposed regulations would establish the qualifications for appointment as a temporary manager, the powers and duties of a temporary manager, and the procedures for temporary managers to document and justify expenditures when seeking reimbursement from state funds.

#### **AUTHORITY AND REFERENCE**

Authority: Sections 1275, 1325.5, and 1335, Health and Safety Code.

Reference: Section 1325.5, Health and Safety Code.

#### **SPECIFIC RATIONALE FOR EACH SECTION**

The specific purpose of each adoption, the problem the Department intends to address, and the rationale for the determination that each adoption is reasonably necessary to carry out the purpose and address the problem for which it is proposed is as follows:

#### **DEFINITIONS**

**Section 72901, subdivision (a).** This proposed regulation is reasonably necessary to provide clarity and reduce confusion over the meaning and interpretation of specific words used in this chapter.

**Section 72901, subdivision (b).** This proposed regulation is reasonably necessary to clarify what constitutes an application for placement on the list of potential temporary managers. While there is no formal temporary manager application form, the term "application" is used in these proposed regulations to refer to the materials submitted by an applicant to the Department to demonstrate the applicant's qualifications for placement on the list of potential temporary managers.

**Section 72901, subdivision (c).** This proposed regulation defines "Department" to clarify that use of that term and avoid confusion.

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<sup>3</sup> Pursuant to HSC section 1417.2, moneys collected as a result of civil penalties imposed against health facilities for noncompliance with state and federal laws are deposited into the State Health Facilities Citation Penalties Account and the Federal Health Facilities Citation Penalties Account, known collectively as the Health Facilities Citation Penalties Account.

**Section 72901, subdivision (d).** A temporary manager may not have a financial ownership interest in the facility or have an immediate family member with a financial ownership interest in the facility (HSC section 1325.5(j)(3)). However, “financial ownership interest” is not defined in the statute, so it is necessary to define that term to improve clarity and make it easier to determine who may serve as a temporary manager of a given facility.

The federal requirements for temporary managers appointed to oversee long-term health care facilities participating in the federal Medicare or Medicaid programs also prohibit a temporary manager or a member of his or her immediate family from having a financial ownership interest in the facility (Title 42 Code of Federal Regulations (C.F.R.) section 488.415(b)(3)). Thus, the Department looked to federal law for guidance and largely adopted the definition of “ownership interest” applicable to participants in these federal programs. The Centers for Medicare and Medicaid Services (CMS) define an ownership interest as “the possession of equity in the capital, the stock, or the profits of the disclosing entity” (42 C.F.R. sections 420.201 and 455.101).

California law is consistent with the federal definition. California’s Medi-Cal regulations mirror the federal definition of “ownership interest” (Title 22 California Code of Regulations (CCR) section 51000.13). The licensing statutes for residential care facilities for the elderly, a facility type licensed by the Department of Social Services, define a “beneficial ownership interest” as “an ownership interest through the possession of stock, equity in capital, or any interest in the profits of the applicant or licensee, or through the possession of such an interest in other entities that directly or indirectly hold an interest in the applicant or licensee (HSC section 1569.2(b)). The Department believes this definition is also applicable to the temporary manager context and is sufficiently broad to encompass both direct and indirect financial ownership interests.

**Section 72901, subdivision (e).** The immediate family members of a temporary manager may not have a financial ownership interest in the facility (HSC section 1325.5(j)(3)). “Immediate family member” is not defined in the statute, so the Department proposes to define this term to improve clarity and reduce confusion for potential temporary managers.

Because the federal requirements for temporary managers contain this limitation, the Department first looked to federal law. “Immediate family member” is defined in various CMS regulations in different contexts, though none of the definitions are identical. (42 C.F.R. sections 403.902 (required reporting of physician ownership and investment interests), 411.351 (financial relationships between physicians and entities furnishing designated health services), 488.301 (composition of long-term health care facility survey teams)). The Department also looked to the definitions used by other states with temporary manager provisions, including New Hampshire and Oklahoma. (N.H. Code Admin. R. He-E 807.01(e); Okla. Admin. Code, section 310:675-15-2(a)(6)). Finally, the

Department looked to California law. The provisions related to the appointment of temporary managers in other facility types, such as residential care facilities and community care facilities, were silent. However, “immediate family member” was defined in other health care contexts in the California Code of Regulations. (22 CCR sections 1253.12-1 (eligibility for unemployment compensation benefits due to death in the family), 51466(c)(2) (disclosure of significant beneficial interests held by Medi-Cal provider)).

The Department’s proposed definition is substantially similar to the definitions referenced above, but the Department also added step-grandchild, aunt, uncle, niece, and nephew to broadly encompass all familial relationships the Department believes would present a reasonable risk of a conflict of interest sufficient to preclude an applicant from serving as a temporary manager.

**Section 72901, subdivision (f).** The Department needs to assure also that no principals of applicant have served for a period of time in the facility or have a financial interest in the facility, nor have their immediate family members. Therefore, “principal” needs to be defined so the Department proposes to define this term to provide clarity and avoid confusion.

The term principal is defined in a variety of ways in Title 22 CCR, and therefore, the definition offered by the Department should be consistent with those definitions of this term. The term generally is associated with those positions that operate or run an entity as an executive officer or member of the board of the entity. The definition that the Department offers is similar to these types of definitions that involve governing boards (22 CCR sections 75317) or the leadership of an entity (22 CCR sections 79113).

The Department’s proposed definition is very similar to those noted above and also adds language to assure that anyone that runs or operates the applicant entity will also be disclosed as a principal (22 CCR section 66270.11). The Department believes that the offered definition will provide clarity and assure that individuals that operate as principals will be disclosed because anyone that is an executive officer or member of the board or who runs or operates the applicant entity will be disclosed under this definition.

**Section 72901, subdivision (g).** The term “temporary manager” is defined in HSC section 1325.5, but the Department includes it here for clarity.

### **QUALIFICATIONS OF A TEMPORARY MANAGER**

These proposed regulations establish the minimum qualifications for a temporary manager and the process for applying for placement on the list of potential temporary managers. These qualifications are based on the qualifications found in the authorizing statute, the CMS requirements for temporary managers (42 C.F.R. section 488.415), and the Department’s requirements for long-term health care facilities found in Title 22 of the California Code of Regulations.

**Section 72903, subdivision (a).** This proposed regulation is reasonably necessary to establish a standing list of potential temporary managers who meet the minimum qualifications set forth in this section.

The Department selects a temporary manager based on the characteristics of the facility, including size and location, the specific circumstances warranting appointment of a temporary manager, and the availability of qualified applicants. Because this decision necessarily requires discretion, placement on the list of potential temporary managers does not guarantee that an applicant will be appointed and does not imply that the applicant is endorsed by the Department in any way. However, the list will promote transparency in the appointment process and will expedite the appointment process when the need for a temporary manager arises, since the need to appoint a temporary manager often arises under exigent circumstances.

**Section 72903, subdivision (a)(1).** This proposed regulation is reasonably necessary to implement HSC section 1325.5(j)(1), which provides that a temporary manager shall be qualified to oversee correction of deficiencies on the basis of experience and education. Upon appointment, a temporary manager steps into the shoes of the licensee and must be able to immediately take steps to eliminate the danger of death or permanent injury to residents and, if needed, transfer residents to alternate placements. The applicant must be able to demonstrate that it is qualified to successfully perform these duties, based either on the applicant's experience or the experience of its employees, agents, or contractors.

**Section 72903, subdivision (a)(2).** This proposed regulation is reasonably necessary to ensure that the temporary manager has an administrator available to operate a facility on short notice. All long-term health care facilities licensed by the Department must have an administrator, who is responsible for the administration and management of the facility. Some facility types are not required to have a licensed nursing home administrator, such as congregate living health facilities, intermediate care facilities/developmentally disabled habilitative, and intermediate care facilities/developmentally disabled-nursing. However, the vast majority of temporary manager appointments occur in skilled nursing facilities, and skilled nursing facilities must employ or otherwise provide a licensed nursing home administrator (22 CCR section 72513(a)). This qualification is reasonably necessary to ensure that the Department's list contains a sufficient number of applicants qualified to operate a skilled nursing facility, since that is where the need is most likely to arise.

This qualification also ensures that the administrator has been previously vetted by the Department, via the licensure process, and is in good standing. As part of the licensure process, all nursing home administrators must complete required training, pass an examination, and receive and maintain a criminal record clearance. Licensure indicates that the individual has already demonstrated trustworthiness to the Department, which is critical when an administrator is charged with overseeing a facility in distress.

The requirement for two years of experience is reasonably necessary to ensure that the administrator has the experience necessary to operate a facility with serious deficiencies. The Department believes two years' prior experience as an administrator is the minimum necessary to effectively oversee the elimination of danger to residents or to manage the transfer of residents to alternative placements without compromising the safety of a vulnerable population.

**Section 72903, subdivision (a)(3).** This proposed regulation implements the requirement found in HSC section 1325.5(j)(2), which provides that a temporary manager must not have been found guilty of misconduct by a licensing board. The Department and other licensing agencies do not necessarily make findings of guilt, but they are authorized to deny, suspend, or revoke licenses based on substantiated findings of misconduct.

A temporary manager is given a great deal of discretion and responsibility for the well-being of vulnerable residents. Given the level of control conferred upon a temporary manager, the risks associated with appointing a temporary manager with a history of misconduct are too great. This regulation is necessary to ensure resident safety and improve clarity.

**Section 72903, subdivisions (a)(4)(A), (B), and (C).** This proposed regulation is reasonably necessary to ensure resident safety. A temporary manager applicant may have been responsible for an event that resulted in a serious deficiency while acting as the licensee, administrator, Director of Nursing, or other employee at a facility. The violation would not necessarily have resulted in action taken against the individual's license. However, the Department considers the types of violations referenced in this proposed regulation to be serious and believes that an applicant with a history of such serious violations is not qualified to oversee the operation of a facility as a temporary manager. The scope of this proposed regulation is narrowly tailored to include only the most egregious violations.

A five-year lookback period is reasonably necessary for citations and federal findings of immediate jeopardy to capture only recent noncompliance. The more time that has elapsed, the lower the risk the applicant or the applicant's employees, agents, or contractors poses to residents. Conversely, citations or federal enforcement findings issued within the past five years reflect current behavior and fitness and are relevant to evaluation of a potential temporary manager. However, with respect to a final termination action, the Department does not believe there should be a time limit on the lookback period. Termination of a provider agreement is the most serious action CMS can take against a provider, akin in many ways to revocation of a facility's license.

**Section 72903, subdivision (a)(5).** This proposed regulation is reasonably necessary to ensure that a potential temporary manager has immediate access to the staff necessary and legally required to operate the facility. If necessary, a temporary

manager must be able to provide interim staffing within 24 to 48 hours for onsite services and operations to bring the facility into operational compliance or safely transfer all residents to another licensed facility within a short period of time. The temporary manager must also comply with the applicable staffing requirements for the facility type. To avoid a lapse in operations or resident care or any other violation of state or federal law, the applicant must have access to a full staff of qualified professionals.

**Section 72903, subdivision (a)(6).** This proposed regulation is reasonably necessary because temporary managers take control of facilities facing severe compliance and/or financial issues. The temporary manager must have access to legal counsel for a variety of reasons, such as to ensure compliance with applicable law with respect to facility operations, to facilitate and effectuate a transfer of ownership to a new licensee, or to transfer residents in compliance with all applicable requirements, should the facility close.

Access to an accounting professional is also reasonably necessary. A temporary manager may be required to do any of the following during the appointment: take over fiscal operations of the facility and restore accountability, assess the fiscal viability of the facility, reconcile accounts payables and receivables, manage collections and bad debt, prepare interim operating budgets, review and manage resident accounts, prepare cash flow and fiscal projections, and prepare financial statements and cost reports. To ensure that these tasks can be accomplished accurately and without delay, a temporary manager must have an existing working relationship with the relevant professionals. Access to accounting professionals is necessary to ensure an accurate accounting of expenditures in accordance with generally accepted accounting principles. Further, upon termination of the appointment, the temporary manager must file a final accounting with the Department and the licensee. Access to accounting professionals is necessary to ensure an accurate accounting of expenditures in accordance with generally accepted accounting principles.

**Section 72903, subdivision (a)(7).** This proposed regulation is reasonably necessary because a temporary manager must have immediate access to the resources necessary to stabilize a facility that may be facing severe financial difficulties. If the facility has no funds, which is often the case by the time a temporary manager is appointed, the temporary manager must have the ability to cover the basic expenses necessary to keep the facility operational pending reimbursement. To avoid adverse consequences for residents based on a lack of funds to operate the facility, the temporary manager must have the ability to cover necessary expenses in the interim.

**Section 72903, subdivision (b)(1).** This proposed regulation is reasonably necessary to implement HSC section 1325.5(j)(3), which provides that a temporary manager shall have no financial ownership interest in the facility and have no member of his or her immediate family who has a financial ownership interest in the facility. The Department must be able to verify compliance with this statutory requirement. This proposed



regulation is also necessary to enable the Department to identify the individuals behind an entity for the purposes of communicating and conducting business with the entity.

**Section 72903, subdivision (b)(2).** Contact information for each applicant is reasonably necessary to facilitate communication with applicants because when a temporary manager is needed it is likely an immediate need.

**Section 72903, subdivision (c).** This proposed regulation is reasonably necessary to notify applicants that the Department may request additional information in connection with an application for placement on the list of potential temporary managers. The Department makes it clear that this is not an open and wide-ranging call for additional documentation, but rather just for additional documentation if the documentation offered did not provide what was required under a specific requirement pursuant to these regulations or what was offered was incomplete to satisfy any specific application requirement.

**Section 72903, subdivision (d).** This proposed regulation is reasonably necessary to clarify that placement on the list of potential temporary managers is time limited. Applicants must submit an annual attestation that the applicant continues to meet the qualifications for placement on the list. If there are any changes to the information previously reported to the Department, the applicant must submit a new application, so the Department has current information on file. The Department believes that requiring applicants to submit an attestation or new application more frequently than annually would be overly burdensome and that submitting an attestation or new application every two years would be insufficient to ensure that the Department has current information about the applicant's qualifications.

### **CHOOSING A TEMPORARY MANAGER**

**Section 72905, subdivision (a).** This proposed regulation is reasonably necessary to clarify how the Department will select a temporary manager from the list of potential temporary managers when the need arises. The Department will contact applicants on the list based on the needs of the specific facility. Interested applicants shall respond with an attestation that the applicant meets the qualifications for appointment. An applicant may be placed on the list of potential temporary managers many months before the Department needs a temporary manager. The information provided in an application may be outdated by the time the Department needs to appoint a temporary manager from the list. This proposed regulation is reasonably necessary to confirm that an interested applicant is still eligible for appointment when the need arises.

**Section 72905, subdivision (b)(1).** This proposed regulation would increase efficiency and transparency in the temporary manager selection process by giving those on the list notice of what they will be expected to provide if contacted by the Department. There may only be days between the Department's determination that appointment of a temporary manager is warranted and the date the temporary manager must enter the

facility. Quick turn-around is necessary to avoid a lapse in services and ensure resident safety.

This proposed regulation is also reasonably necessary to ensure that the individuals who might serve in the facility satisfy all applicable licensure and professional requirements and are in good standing. This information is necessary to ensure resident safety and to allow the Department to evaluate whether an applicant has sufficient qualified staff prior to selecting a temporary manager.

**Section 72905, subdivision (b)(2).** This proposed regulation is reasonably necessary to confirm that the candidate satisfies the requirement in HSC section 1325.5(j)(4), which provides that a temporary manager shall not currently serve, nor within the past two years have served, as a member of the staff of the facility.

**Section 72905, subdivision (b)(3).** Placement on the list alone does not mean that an applicant will be available or interested in appointment at any time or for any facility. This proposed regulation is reasonably necessary to confirm current availability to accept appointment as a temporary manager.

**Section 72905, subdivision (b)(4).** This proposed regulation is reasonably necessary to confirm that a potential temporary manager does not have a financial ownership interest in the facility, in violation of HSC section 1325.5(j)(3). The Department proposes to include the principals of any parent company or subsidiary in this proposed regulation in recognition of the fact that many corporations involved in long-term care facility management have multiple layers of ownership using multiple parent companies or subsidiaries. This proposed regulation will help the Department more accurately determine whether a potential temporary manager has a direct or indirect financial ownership interest in the facility.

**Section 72905, subdivision (b)(5).** This proposed regulation is reasonably necessary to permit the Department to consider the cost of appointing a potential temporary manager prior to appointment. HSC section 1325.5(k)(2) sets out the method for calculating the temporary manager's salary or fee. However, the salary or fee may exceed the amount calculated under the statute if the Department is otherwise unable to attract a qualified temporary manager (HSC section 1325.5(k)(3)). While resident safety and quality of care are the primary considerations when selecting a temporary manager, the Department must also consider whether there are vast differences in the cost of otherwise similarly situated potential temporary managers, since the Department must often use state funds to operate the facility. This proposed regulation will also encourage applicants to offer competitive salaries, which could ease the burden on the Health Facilities Citation Penalties Account if state funds are used during the temporary manager's appointment.

**Section 72905, subdivision (b)(6).** This proposed regulation is reasonably necessary to permit the Department to evaluate whether a potential temporary manager has access to resources to operate the facility during the term of appointment.

**Section 72905, subdivision (c).** This proposed regulation is reasonably necessary to clarify that the decision to appoint a temporary manager is a discretionary decision. Pursuant to HSC section 1325.5(c), the Department has the authority to appointment temporary managers. Appointment is based on a case-by-case determination by the Department, considering the particular circumstances, the availability of qualified applicants, and whether an applicant is qualified and capable of managing a specific facility. The Department necessarily has the discretion to select the temporary manager who is most qualified under the specific circumstances.

**Section 72905, subdivision (d).** HSC section 1325.5(j)(5) provides that the temporary manager shall be acceptable to the facility. The Department believes that, circumstances permitting, it may be reasonable to provide the licensee with one alternate temporary manager from the Department's list. However, the decision to appoint an alternate is in the Department's sole discretion. There may not be any qualified alternates available, or the situation may be so urgent that the Department does not have time to negotiate with the licensee over alternate temporary managers. Ultimately, the Department's priority is ensuring the health and safety of residents.

#### **LICENSEE'S DUTIES**

**Section 72907, subdivision (a)(1).** This proposed regulation is reasonably necessary to clarify the duties of the facility's licensee following appointment of a temporary manager. A temporary manager is appointed to step into the licensee's shoes as a "substitute facility manager or administrator with authority to hire, terminate, or reassign staff, obligate facility funds, alter facility procedures, and manage the facility to correct deficiencies identified in the facility's operation." (HSC section 1325.5(b)). The temporary manager cannot exercise this authority or carry out these duties if the licensee refuses to relinquish control. This regulation is reasonably necessary to reduce any confusion between the licensee, the temporary manager, and the Department.

HSC section 1325.5(b) grants the temporary manager broad authority to obligate facility funds and manage the facility to correct deficiencies. This authority enables the temporary manager to pay for the facility's operational costs and expend funds as necessary to eliminate the risk of harm to residents or facilitate the transfer of residents. However, this authority is meaningless if the licensee does not allow the temporary manager to access the facility's financial records or manage the accounts. Without access to these records and accounts, the temporary manager does not have the information necessary to responsibly manage the facility and cannot assess the facility's financial condition or know the extent of the facility's financial obligations. Finally, without access to these records and accounts the temporary manager would be unable to comply with the accounting requirements imposed by these proposed regulations.

**Section 72907, subdivision (a)(2).** This proposed regulation is reasonably necessary for the reasons stated above. Not only is the temporary manager authorized to obligate facility funds, but the temporary manager's salary is to be paid directly by the facility. (HSC section 1325.5(k)(1)). This proposed regulation clarifies that the licensee must not only allow the temporary manager to access the facility financial accounts but must also allow the temporary manager to expend funds from those accounts for certain authorized purposes.

**Section 72907, subdivision (a)(3).** This proposed regulation is reasonably necessary for the reasons stated above. It is the temporary manager's duty to manage the facility to correct deficiencies identified in the facility's operation. (HSC section 1325.5(b)). To bring the facility into compliance, remove immediate danger to residents, or transfer residents and close the facility, a temporary manager must have access to the facility and all items within the facility.

**Section 72907, subdivision (a)(4).** This proposed regulation is reasonably necessary for the reasons stated above. Because the temporary manager is authorized to hire, terminate, or reassign staff, alter facility procedures, and manage the facility to correct operational deficiencies, it follows that the temporary manager must be vested with all of the management powers of the licensee. The licensee must allow the temporary manager to make personnel decisions and manage the facility without interfering.

**Section 72907, subdivision (b).** Appointment of a temporary manager does not absolve a licensee of the responsibility for complying with the legal requirements applicable to the facility or for fulfilling the financial obligations of the facility. This proposed regulation is reasonably necessary to reduce confusion and to clarify the obligations and expenses for which the licensee remains responsible during the term of appointment of a temporary manager.

**Section 72907, subdivision (c).** This provision is reasonably necessary to prevent a licensee from interfering with the temporary manager during the term of appointment. A temporary manager is statutorily authorized to act as the substitute facility manager or administrator and has specific authorities and duties. A licensee can contest the appointment of a temporary manager via the procedures outlined in HSC section 1325.5(f) through (i), but the licensee cannot otherwise interfere with the temporary manager.

### **TEMPORARY MANAGER'S POWERS, DUTIES AND LIMITATIONS**

**Section 72909, subdivisions (a)(1), (2), (3), (4), (5), and (6).** This proposed regulation would provide a non-exhaustive list of the temporary manager's powers. HSC section 1325.5(b), already authorizes a temporary manager to hire, terminate, or reassign staff; obligate facility funds; alter facility procedures; and manage the facility to correct deficiencies. The Department proposes to include those powers in this proposed regulation for clarity and to specify additional powers that fall within this authority, such as the power to make repairs to the facility. Each of these powers is reasonably

necessary to enable the temporary manager to successfully manage a facility during the term of appointment.

The Department believes it is reasonably necessary to specify that Department approval is required prior to any capital investments to the facility. This language supplements and mirrors HSC section 1325.5(e)(2), which requires Department permission for all long-term capital investments to the facility. Because the temporary manager has control over the facility's funds, Department approval serves as a check on the temporary manager's spending. This requirement reduces the risk that the temporary manager will make frivolous expenditures of facility funds and helps ensure that capital investments are only made when reasonably necessary.

**Section 72909, subdivision (b).** This proposed regulation is reasonably necessary to clarify the limits of a temporary manager's authority to use facility assets. A temporary manager is appointed to operate a facility on a temporary basis with a specific directive: to eliminate immediate danger or death or permanent injury to residents or transfer residents to alternative placements. This proposed regulation is intended to protect against abuse or unnecessary use of facility funds or other assets.

**Section 72909, subdivision (c).** This proposed regulation is reasonably necessary to keep the temporary manager's focus on correcting deficiencies or closing the facility. Fixing payment at the same rate as collected by the licensee helps ensure continuity and efficiency during the term of appointment.

**Section 72909, subdivision (d).** This proposed regulation is reasonably necessary to protect against waste during the term of appointment. Because the temporary manager does not own the facility and is only a temporary possessor, the temporary manager may not make unreasonable or improper use of the facility's building or fixtures which would waste the assets or diminish the value of the assets.

#### **TEMPORARY MANAGER'S FINANCIAL DOCUMENTATION FOR USE OF FACILITY AND STATE FUNDS**

**Section 72911, subdivisions (a)(1), (2), and (3).** These proposed regulations are reasonably necessary to justify the disbursement of state funds from the Health Facilities Citation Penalties Account. As explained above, the Department is authorized to use funds from the Health Facilities Citation Penalties Account to operate the facility after all other facility revenues are exhausted. (HSC section 1325.5(l)). The safeguards in this proposed regulation are reasonably necessary to ensure that a facility receives state funds only after all facility funds are exhausted.

The regulations require that the temporary manager provide all expense invoices, receipts and other expense documentation to the Department so it can be determined what expenses should be allowed and what expenses were reasonably necessary for the operation of the facility. For the Department to determine the allowability or appropriateness of the expenses that use state funds incurred by the temporary

manager, there should not be lack of documentation or invoice detail for all of the expenses incurred by the temporary manager.

Documentation of all expenses is necessary to permit both the temporary manager and the Department to accurately account for the funds used by the temporary manager and to enable the Department to verify claimed expenses and reduce the potential for fraud. Further, a temporary manager may only use facility assets for the reasonable operation of the facility, and these proposed regulations help ensure that any use of state funds is justified.

Finally, the Department is required to post a detailed description of how funds in the Health Facilities Citation Penalties Account are allocated and expended on its website. (HSC section 1417.2(d)(3)). This proposed regulation assists the Department in complying with this requirement.

### **TEMPORARY MANAGER'S FINAL ACCOUNTING**

**Section 72913, subdivisions (a)(1), (2), (3), and (4).** These proposed regulations are reasonably necessary to ensure proper oversight over the temporary manager's financial activities and to account for all funds disbursed to the facility during the term of appointment. The temporary manager has a clear interest in receiving the final accounting because the transactions involved facility funds and other assets. The Department has a clear interest in receiving a final accounting to verify whether the temporary manager complied with these regulations and the terms of the agreement between the Department and temporary manager. The final accounting is also reasonably necessary to deter or identify the fraudulent use of funds by the temporary manager. Further, the Department is required to post a detailed description of how funds in the Health Facilities Citation Penalties Account are allocated and expended on its website. (HSC section 1417.2(d)(3)). This proposed regulation assists the Department in complying with this requirement. Finally, the Department may collect funds used to operate the facility from the Health Facilities Citation Penalties Account and thus, any of these funds used are a debt due to the State of California. Therefore, the accounting conducted pursuant to this proposed regulation will document and audit this amount that would constitute a debt owed by the licensee that can be collected thereafter by the Department. (HSC section 1325.5(l)(2)).

### **Documents Relied Upon**

1. California Advocates for Nursing Home Reform. Letter received September 26, 2019.
2. Temporary Management, Stakeholder Engagement Meeting Comments, August 26, 2019.

## ECONOMIC IMPACT ASSESSMENT

The Department has made an initial determination that these regulations would not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The Department has determined that a small or typical business would incur minor administrative costs in reasonable compliance with the proposed action. The proposed regulations require interested temporary manager applicants to submit an application package to the Department and to comply with the Department's procedural requirements, but they do not compel a private person or business to take any additional action. The proposed regulations do not impose any costs on residents of long-term health care facilities and will have no effect on Medi-Cal or Medicare. The proposed regulations would not significantly affect:

- 1. The creation or elimination of jobs within the State of California.** The proposed regulations do not create new positions for temporary managers; they merely establish the qualifications for appointment and powers and duties of a temporary manager, should one be required.
- 2. Creation of new businesses or the elimination of existing businesses within the State of California.** The proposed regulations do not affect the number of licensed long-term health care facilities in California or the number of long-term health care facility management companies.
- 3. The expansion of businesses currently doing business within the State of California.** The proposed regulations do not affect the number of licensed long-term health care facilities in California or the number of long-term health care facility management companies that could expand.
- 4. The benefits of the regulation to the health and welfare of California residents, worker safety, and the state's environment.** The proposed regulations benefit the health and welfare of California residents because they create additional safeguards to protect the residents of long-term health care facilities, who are among the most vulnerable members of the state's population. Establishment of a standing list of potential temporary managers will expedite the appointment process when the need for a temporary manager arises. By clarifying the qualifications and duties of all temporary managers, these regulations ensure that the quality of resident care does not decline during appointment of a temporary manager.

### Reasonable Alternatives Considered

The Department has determined that no reasonable alternative considered by the Department, or otherwise identified and brought to the attention of the Department, would be more effective in carrying out the purpose for which the action is proposed, or as effective and less burdensome to affected private persons than the proposed regulatory action (amendments), or more cost-effective to affected private persons and equally effective to protect patients' and workers' safety and health.

**Impact on Small Business**

The Department has determined that the proposed regulations will have a minimal impact on small businesses. The regulations affect only individuals or business entities who wish to apply to become a temporary manager of a long-term health care facility and do not impose a statewide mandate. Any small business that meets the proposed qualifications for placement on the list of potential temporary managers would likely already be compiling and submitting similar information to the Department as either a nursing home administrator or a facility management company. Applicants for these types of approvals already submit information similar to the materials required by these proposed regulations to the Department. Thus, the Department anticipates that preparation and submission of a temporary manager application will not create significant workload for interested small businesses.