ROPES & GRAY

ALERT

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# New York Passes New Health Care Transaction Notice Requirements

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On Wednesday, May 3, 2023, Governor Kathy Hochul signed the New York State ("NYS") budget for State Fiscal Year 2023–2024 into law, which, among other strategic initiatives, requires certain health care entities to provide a thirty (30)-day pre-closing notice to the State Department of Health ("DOH") of certain "material transactions" that meet revenue thresholds within the State. Upon receipt of a transaction notice, DOH will submit the notice to the Office of the New York Attorney General and post a summary of the proposed transaction on its website with an invitation for public comment.

The enacted legislation is notably different than the Governor's initial proposal as part of her executive budget (*see* our previous Alert), which gave DOH broad authority to both review and *approve* material transactions and delegated to DOH the ability to define what transactions eclipse the threshold of materiality. While the enacted legislation imposes notice requirements, it does not grant DOH approval authority and excludes "de minimis" transactions from review.

The new notice requirement, which will begin to apply to transactions on or about August 1, 2023, likely serves as a mechanism for the State to collect data on health care transactions involving private equity and investor-backed entities to require that these transactions be assessed under a "health equity" rubric (consistent with recent changes to the certificate of need ("CON") requirements for licensed facilities) and to provide increased public transparency regarding such transactions. The legislation may also set the stage for the adoption of more onerous approval requirements in the future.

A detailed description of the law and what it will mean for health care transactions in New York is provided below.

## Review Process

*Definition of Material Transactions.* The new law defines "material transactions" in the same manner as Governor Hochul's initial proposed bill, as follows:

1. A merger with a health care entity;
2. An acquisition of one or more health care entities including, but not limited to, the assignment, sale, or other conveyance of assets, voting securities, membership, or partnership interests or the transfer of control;
3. An affiliation agreement or contract formed between a health care entity and another person; or
4. The formation of a partnership, joint venture, accountable care organization, parent organization, or management services organization for the purpose of administering contracts with health plans, third-party administrators, pharmacy benefit managers, or health care providers as prescribed by the commissioner by regulation.[1]

*Exclusions to Review.* The law excludes the following transactions from review, notably adding an exclusion for "de minimis" transactions that was not included in prior versions of the bill:

1. Clinical affiliations of health care entities formed with the intent to facilitate collaboration between the entities;
2. Transactions already subject to the CON process or an insurance entity approval process under the New York Public Health or Insurance Laws; and

3. "De minimis" transactions, which are defined to mean a transaction or series of transactions resulting in a health care entity increasing its total gross in-state revenues by less than twenty-five million dollars ($25 million).[2]

*Definition of Health Care Entity.* The definition of a "health care entity" includes physician practices, physician groups, management services organizations, or similar entities that provide all or substantially all of the administrative or management services under contract with one or more physician practices, provider-sponsored organizations, health insurance plans, or any other kind of health care facility, organization, or plan providing health services in New York. The law, however, explicitly excludes licensed New York insurers and pharmacy benefit managers from the definition.[3] It is also important to note that New York is the only state to date that includes management services organizations in the statutory definition of a health care entity, subject to these transaction review laws.[4]

*Notice Requirements.* A health care entity undergoing a material transaction must submit written notice to DOH at least thirty (30) days prior to the closing date of a transaction.[5] The notice and review process will be further defined in regulations developed by DOH. The written notice must include the following elements:

1. Names and addresses of the parties to the transaction;
2. Copies of the definitive agreements;
3. Locations impacted by the transactions;
4. Plans to reduce or eliminate services or plan participation;
5. Closing date; and
6. Description of the purpose of the transaction, including the following:
    a. anticipated impacts on cost, quality, access, health equity, and competition in the impacted markets, which may be supported by data and a formal market impact analysis; and
    b. any commitments by the health care entity to address the anticipated impacts.[6]

Following submission, DOH will forward the notice and supporting documentation to the antitrust health care and charities bureaus of the Office of the New York Attorney General.[7] DOH will also post on its website a summary of the transaction, an explanation of the groups likely to be affected, information about how the transaction may affect provision of the health care entity's services, and details about how to submit comments.[8] Health care entities must also notify DOH upon the closing of the transaction in a form to be later defined by DOH.[9]

## Consequences of Non-Compliance

To ensure that penalties for non-compliance ensure adherence, the law grants DOH the power to impose a civil penalty of $2,000 for each day that a transaction is out of compliance. This penalty may be increased to an amount up to $5,000 for subsequent violations that represent a "serious threat to the health and safety" of individuals.[10] Each day that the violation continues is a separate violation. The penalty presumably extends in perpetuity until and unless a notice is filed.

## Parallel Legislation in Other States

As we previously highlighted, New York's legislation follows the emergence of similar legislative efforts in a number of states that have imposed health care transaction notice, review, and/or approval requirements. A sampling of recently enacted laws follows:

| | Massachusetts | Washington | Oregon | California | New York |
|---|---|---|---|---|---|
| **Timing** | 60 days pre-closing, but up to 215 days if a cost and market impact review is triggered | 60 days' prior notice; the attorney general can request more information within 30 days of the initial filing | 30–180 days pre closing | 90 days' prior notice (unclear if pre-signing or closing) | 30 days pre-closing |
| **Covered Entities** | Providers and provider organizations (entities in the business of health care delivery or management that represent health care providers) | Health care entities (e.g., hospitals, hospital systems, and provider organizations) | Must involve a health care entity | Health care entities (e.g., payor, provider, or fully integrated delivery system) | Health care entities (e.g., physician practices, physician groups, and management services organizations) |
| **Covered Transactions** | Mergers and acquisitions ("M&A") and the formation of partnerships, joint ventures, ACOs, and MSOs | M&A; contracting affiliations that allow entities to negotiate rates with payors | M&A; managed services organizations ("MSOs") that impact access to essential services | M&A | M&A and most forms of change-in-control transactions but not clinical affiliations |
| **Materiality Thresholds** | Entities with >= $25 million annual patient services revenue in the state | If one entity is not licensed in WA, then they must generate $10M in revenue from WA patients | One entity >= $25 million/year in revenue (all states + OR)<br><br>One entity >= $10 million/year in revenue (all states + OR) | "Material change" to ownership, operations, or governance structure | Transaction must result in health care entity increasing in-state revenues by $25 million or more |

Several other states are following suit, with proposed legislation recently introduced in the following states:

- **Illinois** is considering proposed legislation (House Bill 2222) that would require provider organizations and health care facilities to provide thirty (30)-day pre-closing notice to the state attorney general's office for proposed transactions.
- **Maine** is considering proposed legislation (H.B. 894) that would require sixty (60)-day pre closing notice and approval of material health care transactions from the state attorney general's office.
- **North Carolina** is considering proposed legislation (Senate Bill 16) that would require hospital entities and any entities affiliated with hospital entities to provide ninety (90)-day pre-closing notice to the state attorney general's office for proposed transactions.
- **Minnesota** is considering proposed legislation (HF 402) that would require health care entities to notify the state attorney general and the Commissioner of Health at least ninety (90) days prior to completion of a covered transaction.

- **Washington** is considering proposed legislation (Senate Bill 5241) that seeks to expand the scope of the current review process in Washington, including lengthening the notice period, broadening the scope of entities subject to notice requirements, and enhancing the state attorney general's enforcement authority.

## Impact and Implications

While the enacted law achieves only part of what Governor Hochul initially proposed, its passage indicates NYS legislators' willingness to join a growing list of states in their efforts to enact new review processes of material health care transactions and to impose disclosure requirements on entities that were not previously captured under states' regulatory regimes. By requiring the public posting of transaction summaries and other transaction information online and inviting public comment, the new law will undoubtedly draw increased scrutiny of proposed health care transactions, especially for those transactions not previously reportable under any other state regulatory regime.

Moving forward, the regulatory rulemaking will be important to follow because it will provide further details about the DOH notice and review process. We recommend that health care entities—including private-equity-backed entities and management services organizations—closely monitor this law and other similar emerging legislation nationwide.

1. NY Pub. Health L. § 4550(4).
2. NY Pub. Health L. § 4550(4)(b).
3. NY Pub. Health L. § 4550(2).
4. Oregon has taken the position that management service organizations are "health care entities" in regulatory guidance as opposed to statute or regulation.
5. NY Pub. Health L. § 4552(1).
6. NY Pub. Health L. § 4552(1).
7. NY Pub. Health L. § 4552(1).
8. NY Pub. Health L. § 4552(2).
9. NY Pub. Health L. § 4552(3).
10. NY Pub. Health L. § 4552(4) ("Failure to notify the department of a material transaction under this section shall be subject to civil penalties under section twelve of this chapter. Each day in which the violation continues shall constitute a separate violation"); *see also* NY Pub. Health L. § 12.