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Healthcare Alert

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New York to Increase Scrutiny of Healthcare Transactions

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New Article 45-A of the Public Health Law requires detailed disclosures to the New York State Department of Health and Attorney General, at least 30 days before closing.

What's the impact?

- Health care entities, including physician practices and MSOs, will be required to disclose the details of "material transactions" to DOH, at least 30 days prior to closing. DOH will forward the disclosures to the AG.
- Failure to disclose may result in civil penalties of up to $2,000 per day.
- The law takes effect August 1, 2023. To clarify and implement the law, DOH will need to propose and adopt regulations, which will take substantially longer. However, DOH may attempt to implement the law through subregulatory guidance.

On May 3, 2023, Governor Kathy Hochul signed a bill into law that, following a trend in several other states over the last ten years, provides New York State with increased visibility into

healthcare transactions that fall below the federal Hart-Scott-Rodino threshold for mandatory pre-transaction reporting.[1] Although such smaller transactions have always been subject to regulation by New York's Attorney General under the federal antitrust laws and New York's Donnelly Act, Article 45-A of the Public Health Law will provide the State with details concerning healthcare transactions that, in past years, would likely have gone unnoticed. The new law is the latest effort by the executive branch to address a perceived lack of oversight of for-profit entities in health care space—in particular, physician practices linked to private equity-backed management services organizations (MSOs).

Details of the Material Transaction Disclosure Law

Effective August 1, 2023, New York will require that notice of "material transactions" between "health care entities" be provided to the New York State Department of Health (DOH) at least thirty days before the closing date of the transaction.[2] Health care entities include physician practices and MSOs but exclude insurers and pharmacy benefit managers.[3]

In a significant departure from an earlier version of the bill, the law does not authorize DOH to approve or disapprove any material transaction.[4] Instead, DOH must immediately forward any notice it receives to the Attorney General's Antitrust, Health Care and Charities Bureaus. DOH must also post on its public website a summary of the transaction, an explanation of who will likely be impacted, information about any services provided by the parties, commitments by the parties to continue to offer those services, information concerning any services that will be reduced or eliminated, and instructions for the submission of comments to DOH on the transaction.[5]

A material transaction is defined as any of the following that occur during a single transaction or in a series of related transactions within a rolling twelve-month period:

- a merger with a health care entity;
- an acquisition of one or more health care entities, including the assignment, sale, or other conveyance of assets, voting securities, membership or partnership interests or the transfer

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[1] L. 2023 ch. 57 (Part M). California (California Health Care Quality and Affordability Act, Cal. Health & Safety Code §§ 127500 et. seq.), Massachusetts (Mass. Gen. Laws Ann. ch. 6D, § 13; Mass. Regs. Code tit. 958, §§ 7.00 et. seq.), Oregon (OR. Rev. Stat. §§ 415.500 et. seq.; OR. Admin. R. §§ 409-070-0000 et. seq.) and Washington (Wash. Rev. Code §§ 13.390.010 et. seq.) have healthcare transaction review laws on the books, while Illinois (Ill. House Bill 2222 (103d Gen. Assembly), and North Carolina (Sen. Bill 16, Session 2023) are among the states with pending bills in their state legislatures.

[2] L. 2023 ch. 57 (Part M, § 2); Public Health Law § 4552.

[3] Public Health Law § 4550(2).

[4] See Health & Mental Hygiene Article VII Legislation, Part M, § 5.

[5] Public Health Law § 4552(2)(b).

of control;

- an affiliation agreement or contract formed between a health care entity and another person; or
- the formation of a partnership, joint venture, accountable care organization, parent organization, or MSO for the purpose of administering contracts with health plans, third-party administrators, pharmacy benefit managers, or health care providers.[6]

"Control" includes the ability to direct or cause the direction of management, administrative functions and policies of a health care entity (e.g., a management or administrative services agreement between a professional entity and an MSO).

The law carves out certain transactions that are not "material." The most notable exception is for a "de minimis transaction." A transaction or a "series of related transactions" is de minimis and is not required to be reported to DOH if it does not result in an increase in one of the parties' "total gross in-state revenues" by at least $25 million.[7]

The disclosure requirement also does not apply to any transaction that is already subject to DOH review under the existing certificate of need process, which generally applies to the sale, establishment, or construction of a regulated healthcare facility or agency.[8]

The de minimis transaction carveout was not in the original bill, but is a welcome addition from the provider industry's perspective. However, the statute fails to provide any guidance as to how one calculates the increase in "in-state revenues" attributable to particular transaction or series or related transactions. For comparison, Massachusetts also uses a $25 million threshold for a party to a transaction to have reporting requirements, but measures that threshold by revenues received from third-party payors.[9] Presumably, DOH will resolve this ambiguity in forthcoming regulations.

The notice of a material transaction to DOH must include:

- Copies of any definitive agreements that contain the terms of the material transaction;
- Identification of all locations where healthcare services are currently provided by each party and the revenue generated in the state from those locations;
- Any plans to reduce or eliminate services and/or participation in specific plan networks; and
- A brief description of the nature and purpose of the proposed material transaction, including:

[6] See Public Health Law § 4550(4)(a).

[7] Public Health Law § 4550(4)(b).

[8] Id.

[9] Mass. Regs. Code tit. 958, § 7.03(1) and § 7.02.

- the anticipated impact of the material transaction 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
- any commitments by the health care entity to address anticipated impacts.[10]

Any failure to notify DOH of a material transaction within the thirty-day timeframe is subject to a civil penalty of up to $2,000 per day.[11]

Analysis

This new law is consistent with the New York executive branch's growing apprehension of deal activity by for-profit healthcare entities. In recent years, the New York Attorney General has increased its scrutiny of sales of non-profit senior living facilities to for-profit operators, particularly in the skilled nursing facility context. This followed the controversial sales of two non-profit nursing homes - Rivington House on Manhattan's Lower East Side in 2015 and CABS Nursing Home in Brooklyn's Bedford-Stuyvesant neighborhood in 2016 - to a for-profit operator. However, the operator closed both nursing homes within a year and, in the case of Rivington House, sold the facility to a developer of luxury condominiums, earning a $72 million profit from the "flip."[12] These transactions prompted an Attorney General investigation into possible misrepresentations by the buyer to State officials that the facilities would continue to operate as nursing homes.[13] The investigation ultimately resulted in a $2 million settlement.[14] The Attorney General now requires a written commitment from a for-profit buyer to operate the nursing home for at least five years post-closing.[15]

The new material transaction disclosure law continues that trend. The bill's original version included language that offers significant insight into what motivated its introduction by the Executive.[16] Specifically, the original legislative purpose provision asserted that private equity-aligned practices increasingly resemble diagnostic and treatment centers, but are not subject to the same extensive regulations.[17] The bill also voiced concerns over the effect that the proliferation of large, investor-backed physician practices have on the quality of patient care,

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[10] Public Health Law § 4552(1). The notice provided to DOH will not be subject to disclosure under New York's Freedom of Information Law. Public Health Law § 4552(2)(a).

[11] Public Health Law § 4552(4); Public Health Law § 12(1).

[12] J. David Goodman, *New York Attorney General Seeks to Halt Sale of 2 Nursing Homes Amid Inquiries*, N.Y. Times, June 6, 2016.

[13] Id.

[14] Jonathan Lamantia, *Nursing Home Chain Looks to Future After Scandal; Allure's $2 Million Settlement Clears it to Grow Again*, 34 Crain's N.Y. Business 9 (Jan. 15, 2018).

[15] New York State Attorney General, Charities Bureau, *The Sale of Nonprofit Nursing Homes Pursuant to the Not-for-Profit Corporation Law* (issued November 2018), at 5.

[16] See Health & Mental Hygiene Article VII Legislation, Part M, § 5.

[17] Id.

healthcare costs and access to services.[18] Unsurprisingly, there was no mention of the benefits of private equity's involvement in healthcare, including the provision of access to capital to fund novel treatments, improve infrastructure and rehabilitate crumbling physical plants.[19]

Ultimately, the Legislature chose not to include the Governor's legislative purpose and intent language in the final bill. However, the original version suggests that increased antitrust enforcement activity by the Attorney General is a distinct possibility in connection with the private equity healthcare transactions that are disclosed as required by the new law.

What's Next?

DOH will issue regulations that should clarify the more ambiguous elements of the law. DOH's rulemaking process typically takes at least six months, though it can take longer depending on the volume and nature of public comments it receives. Given the law's effective date of August 1, 2023, it is possible that DOH will issue subregulatory guidance to implement the law while it develops regulations. Nixon Peabody will continue to monitor this law and the developments in DOH regulations and guidance in the coming months.

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[18] Id.

[19] See, e.g., Nate Birt, *How Private Equity Improves U.S. Health Care and Modern Medical Practices*, DealFlow's Healthcare Services Investment News (Sept. 22, 2022).