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New York's New Notice Requirement for Practice Management Deals Demonstrates a Trend That Should be Carefully Watched

Health Care Law Brief on **August 22, 2023**

Following New York State Governor Kathy Hochul's proposal in February of this year (see our previous alert), the New York legislature passed and Governor Hochul signed a law on May 3, 2023, which significantly increases the state's focus and visibility into physician practice management change-of-control transactions.[1] New York's statute reflects a growing trend of states taking note of transactions that previously were not regulated by state administrative agencies. As we await the promulgation of regulations from the New York State Department of Health ("DOH"), we examine here how New York's law compares to similar laws in other states, and describe precautions that operators in the physician management space — as well as those who do businesses with such operators — should take to safeguard themselves against major disruptions to operations.

Background: The NASHP Model Act

In November 2021, the National Academy for State Health Policy ("NASHP") published a model act for state oversight of proposed health care mergers ("Model Act"). In its announcement concerning the Model Act, NASHP described the Model Act as a tool for "improved oversight" of health care provider mergers. The Model Act is premised on the notion that market consolidation in health care is unfavorable and, as such, is designed to slow down certain health care transactions to provide a state regulator the opportunity to review — and potentially prevent — certain transactions. The Model Act seeks to avoid judicial review, instead creating administrative procedures that allow state regulators to "more easily impose conditions on a transaction" to be "paid for through fees charged to the parties of the transaction."

Simply put, according to its drafters, the Model Act allows "a state attorney general to block or place conditions on problematic transactions without going to court," mainly through the consent requirement in the Model Act. While it appears that the New York legislature leveraged the Model Act in its initial draft statute, New York's final law grants regulators materially less administrative control over these transactions than the Model Act. Critically, the version of the New York law that ultimately passed, in contrast to the initial proposal, requires only notice to — and not consent of — state regulators.

The Regulatory Landscape for Notice and/or Consent

Oregon's ORS 415.500 et seq. took effect March 1, 2022. It not only is the first state law in the country to require regulatory approval prior to closing a material transaction in the physician management industry, but also is the most onerous such law in effect today. Specifically, Oregon's law requires a lengthy 180 days' pre-closing notice to the Oregon Health Authority. Within 30 days of receipt of such notice, the Oregon Health Authority ("OHA") must conduct a preliminary review of the submission and the transaction may only close following approval or conditional approval by OHA, the criteria for such approval to include: (i) the transaction is in the interest of consumers and is urgently necessary to maintain the solvency of an entity involved in the transaction; (ii) the transaction does not have the potential to negatively impact access to affordable health care in the state; or (iii) the transaction is likely to benefit the public good and communities.[2]

Although California currently does not include a consent requirement, the state is considering AB 1091, which would require written notice of a material covered transaction to the California Attorney General at least 90 days prior to closing. California's proposed legislation is unique in that the California Attorney General would have the full 90-day period following its receipt of written notice to give consent or conditional consent, to deny approval for the transaction, or to extend the review period by an additional 45 days.

The final statute signed into law by Governor Hochul puts New York squarely within the category of states that requires only pre-transaction notice, rather than, as compared with Oregon (and potentially, California), requiring regulatory consent. New York's law also requires just 30 days' prior written notice, which is currently one of the shortest such timeframes, as summarized in the chart below.[3]

Enacted[4]

State	Notice and/or Consent Required?
CA	90 days' prior notice
CT	30 days' prior notice
IL	30 days' prior notice
MA	60 days' prior notice
MN	60 days' prior notice (>$80M) 30 days' prior notice ($10M - $80M)
NV	60 days' prior notice
NY	30 days' prior notice
OR	180 days' prior notice, **and** ***consent*** within 30 days
WA	60 days' prior notice

Proposed[5]

State	Notice and/or Consent Required?
CA	90 days' prior notice, **and** ***consent*** within 90 days (plus a potential 45?day extension period)
PA	90 days' prior notice

Materiality Thresholds Applicable to Covered Transactions

Importantly, the health care laws described above that require notice and/or consent to regulators only apply to certain covered entities, and exclude from their purview smaller transactions below relevant materiality thresholds.

New York's law does not increase the disclosure burden for transactions that are already subject to review under other New York laws or create reporting requirements for transactions in which a health care entity's gross in-state revenue is increased by less than $25 million as part of a single transaction or series of transactions over a 12-month period.[6] New York's materiality provisions are similar to other states, and regulate a narrower range of transactions than certain other states. For example, Washington requires notice for all transactions involving provider organizations other than those involving only out-of-state entities that generate less than $10M of revenue from Washington residents.[7]

Substance of Notice to State Regulators; Confidentiality of Disclosures

The contents of each state's required pre-transaction notice are set forth in statute, regulation, and/or sub-regulatory guidance. In New York, reporting entities must provide:

- the names and addresses of the parties to the transaction;
- copies of the definitive agreements;
- locations impacted by the transactions;
- plans to reduce or eliminate services or plan participation;
- the closing date; and
- a 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.[8]

Confidentiality is a key consideration for parties submitting information pursuant to these new laws. In some states, information submitted in connection with the pre-transaction notice is subject to public disclosure or comment.[9] Under California's law, all information and materials submitted to the California Office of Health Care Affordability ("OHCA") related to a material transaction "likely to have a risk of a significant impact on market competitions, the state's ability to meet cost targets, or costs for purchasers and consumers" will be publicly available. Note, however, that OHCA's proposed regulations, released on July 27, 2023, outline a procedure by which a reporting entity may request to designate portions of the submitted information confidential.

On the other hand, the Connecticut law keeps confidential and exempts from the disclosure under the Connecticut Freedom of Information Act notices and supporting materials provided to the Attorney General.[11] New York, again, occupies the middle ground. In New York, the Attorney General must post a summary of the proposed transaction online for public comment; however, the material submitted to DOH (and then transmitted to the Attorney General) are not posted in full.[12]

DOH went live with New York's submission webpage on August 1, 2023, the effective date of the new state law. The webpage provides a summary of the pre-transaction notice requirements discussed above and notes that the submission form will be posted there once finalized.

Considerations for Entities Looking to Invest in Physician Practice Management Entities

Prior to the enactment of laws similar to N.Y. Pub. Health Law §§ 4550 et seq., state regulatory agencies had limited ability to slow change-of-control transactions of physician practices and management services companies related thereto. However, financial sponsors and private lenders should take heed of the increased state scrutiny in this space, as notice periods and potential approval requirements from state regulators could pose an impediment to closing transactions expeditiously.

Buyers and sellers of such businesses will certainly feel the impact of this regulatory burden in their M&A processes, though in many states (such as New York), the relatively modest notice periods likely will not materially delay most transactions.

Creditors of such businesses, however, may be impacted more acutely in a downside scenario, as they may be prevented by such laws from quickly transferring ownership — to themselves, or a third party — resulting in a substantive change to the negotiating leverage of various stakeholders. For example, while a 30-day notice period will likely not be a significant impediment to the sale of a performing practice management business located in New York to a private equity sponsor, a 30-day notice period could effectively eliminate the ability of the lenders to such a business from foreclosing on its equity interests in the event that the company defaults on its loans. Further, if more states follow the lead of Oregon and adopt consent requirements, such as California's proposed AB 1091, we anticipate that the effect will be felt most in the distressed market, further hurting recoveries for impaired lenders.

Finally, we note that the laws discussed above, including in New York and certain other jurisdictions, await further regulations and guidance that are yet to be promulgated and will impact various issues of interest to industry participants, including, in many cases, specifying the precise parameters of material transactions that are covered by the laws (and, alternatively, those transactions that are not). These future rules could affect, for example, whether an exercise of remedies by creditors of a practice manager would require advance notice to regulators. Proskauer will continue to monitor for and update our clients regarding such important developments.

Key Take-Away

New York's material transactions law is a relatively moderate addition to the growing patchwork of state regulations of practice management transactions, but investors in the industry should keep a watchful eye on further developments that may have a material impact on their deals, particularly in distressed circumstances. Careful consideration of these issues, timely analysis of new developments and appropriate legal structuring will help all parties achieve their objectives and avoid unexpected results as the regulatory landscape for managed practices continues to change.

[1] *See* N.Y. Pub. Health Law §§ 4550 – 4552.

[2] *See* ORS § 415.501.

[3] *See* N.Y. Pub. Health Law § 4552.

[4] *See* Cal. Health & Saf. Code § 127507(c)(2); C.G.S. § 19a-486i(c); IL P.A. 103-0526 (H.B. 2222); MGL c. 6D, § 13(a); MN Stat. § 145D.01(2); NRS § 439A.126; N.Y. Pub. Health Law § 4552; ORS § 415.501; RCW § 19.390.030.

[5] *See* CA AB 1091; PA SB 548.

[6] *See* N.Y. Pub. Health Law § 4550(b).

[7] *See* RCW § 19.390.030.

[8] *See* N.Y. Pub. Health Law § 4552(1).

[9] *See e.g.*, NRS § 439A.126; Cal. Health & Saf. Code § 127507(c)(2).

[10] Cal. Health & Saf. Code §§ 127507, 127507.2

[11] *See* CGS § 19a-486i(f).

[12] *See* N.Y. Pub. Health Law § 4552(2).

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