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Jason S. Greis, Nesko Radovic and Nicholas E. Adamson published article in RPA Newsletter's January 2024 issue | New State Healthcare Antitrust Laws Require Pre-Closing Notice for Certain Healthcare Transactions

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During the past year, a number of states have enacted antitrust legislation relating to healthcare entities, which, once effective, will implement a dedicated health care transaction review process by relevant state agencies. States that have enacted such legislation in 2023 include California, New York, Minnesota and Illinois. These states join Colorado, Connecticut, Massachusetts, Nevada, Oregon and Washington, which previously enacted similar laws, making this a legislative trend that is likely to continue into 2024 and beyond.

States are passing new laws requiring approval of healthcare transactions in response to growing consolidation in the healthcare industry and with the goal of obtaining notice of smaller transactions that would not otherwise trigger the need for federal antitrust filings in compliance with the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), which requires companies and individuals to report large transactions to the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) Antitrust Division. These new reporting requirements are likely to have an immediate impact on nephrology and other physician sectors currently experiencing a wave of heavy private investment and consolidation activity.

While the specific state laws vary in individualized requirements, they all share the common goal of empowering state regulators to assess the impact of proposed healthcare transactions on local market competition. For example, Illinois Attorney General Kwame Raoul has stated that the goal of the Illinois legislation, is to increase oversight of health care transactions ". . . to better assess whether action is needed to protect the public from health care facility mergers that lessen competition."[1] As a result, provider specialties, including but not limited to, nephrology, dermatology and reproductive medicine, , which have seen an influx of private investment and consolidation over the last few years, are likely to receive increased government heavy scrutiny in the context of mergers and acquisitions. While the requirements in most states to comply with these statutes are not unduly onerous, the scope of applicability for the new laws could be vast and could impact a large portion of healthcare-related transactions.

For example, Illinois House Bill 2222 (Public Act 103-0526)[2], which becomes effective January 1, 2024, does not feature a minimum transaction value to trigger the notice requirement. Instead, prior notice of a healthcare transaction is based solely upon whether an entity and transaction fall within

the broadly drafted scope of the law. The Illinois legislation regulates any merger, acquisition or contracting affiliation between two or more “healthcare facilities” or “provider organizations.” A “provider organization” is defined as an organized group of persons, whether incorporated or not, in the business of health care delivery or management that represents twenty or more health care providers in contracting with health care carriers or administrators in the payment of health care services. Under the law, provider organizations include physician organizations, physician-hospital organizations, independent practice associations, provider networks and accountable care organizations. “Healthcare facilities” are defined as hospitals, ambulatory surgery centers, kidney disease treatment centers and outpatient surgery used to provide healthcare services, as defined under the Illinois Health Facilities Planning Act.

Because these definitions are so broad, this new law could impact a variety of different types of typical nephrology and dialysis arrangements, including but not limited to dialysis joint ventures and nephrology group practice acquisitions and mergers. In addition, transactions between an Illinois healthcare entity and an out-of-state healthcare entity, where the out-of-state entity will generate over $10 million in annual revenue from patients residing in Illinois, will also be subject to the new notice requirement. Most of the new laws of the states discussed above also feature similarly-broad language likely to encompass many different types of transactions. For example,

-] Effective as of January 1, 2024, California will require a change of ownership filing in any transaction where there is a change of control (direct or indirect) and where the entity owns or leases property. [3] California explicitly requires such notice in any transactions involving a change of ownership of a healthcare entity from physician owners to private equity owners as well, regardless of the size of the deal.
- Effective as of August 1, 2023, New York began requiring physician practices and management services organizations to submit a notice filing to the New York Department of Health prior to most mergers, acquisitions, and affiliation transactions, all of which are defined broadly without carveouts for small transactions. [4]

In addition, states are implementing waiting periods between the date when notice of a transaction is provided and the date when a transaction may close that could delay transaction closings. In California, the waiting period is set at ninety days, but if the California Office of Health Care Affordability chooses to issue a Cost and Market impact review, the minimum waiting period extends out to at least eight months. New York and Illinois require at least thirty days’ notice prior to most mergers, acquisitions and affiliation transactions, which also may be extended if the Attorney General’s Office requests additional information.

Generally, most of the state laws requiring notice of healthcare transactions require that the notice to the state agency identify the parties, the impacted facility locations, the effective date of the transaction and a description of the nature and purpose of the transaction. Similar to HSR Act filing, once written notice is given, the applicable state regulatory agency has a fixed amount of time to request additional information. If an agency requests additional information, the transaction cannot close until this additional information is provided and the state oversight agency approves the transaction.

It is possible that this new process may cause substantial delays in transaction closings. Further, if a state agency believes that a transaction could be anticompetitive, reduce market competition or result in higher costs to consumers, it is possible that the parties could be prevented from completing a transaction. Accordingly, transaction closing timelines must be carefully considered in light of these new notice requirements.

If prior transaction notice is not timely provided, parties could face civil and criminal penalties. For example, Illinois' Attorney General has authority to pursue criminal and civil charges under Illinois' new law against parties who do not adequately address the notice requirements under the Illinois Antitrust Act. In California, while the California Office of Health Care Affordability cannot bring an action or enjoin the transaction, the California Attorney General has the right to do so. In addition to state law liability, the DOJ and FTC have been signaling that the agencies will be issuing updated merger guidelines accounting for these new state laws and that promote joint state and federal analysis of certain healthcare transactions.

These new antitrust laws have been enacted in numerous states over the last two years and there are a handful of other states where similar legislation is pending. These new statutes, coupled with the federal government's renewed antitrust vigor, signal changing tides for the current wave of healthcare transactions. Physicians, health systems and private equity investors must be ready for increased scrutiny of their transactions and contractual arrangements moving forward.

The Benesch Healthcare+ team monitors developments in this area of the law and may provide additional updates as they become available. Please contact the authors of this article for additional information or if you have any questions.

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[1] Office of the Illinois Attorney General, Attorney General Raoul Announces House Passage of Legislation Increasing Oversight of Health Care Market Consolidations (March 27, 2023), available at https://illinoisattorneygeneral.gov/news/story/attorney-general-raoul-announces-house-passage-of-legislati increasing-oversight-of-health-care-market-consolidations.

[2] Illinois House Bill 2222 (Public Act 103-0526) available at https://www.ilga.gov/legislation/fulltext.asp DocName=&SessionId=112&GA=103&DocTypeId=HB&DocNum=2222&GAID=17&LegID=146481&SpecSes

[3] The Office of Health Care Affordability, Emergency Regulation Text, 22 CCR 97431 et seq. (effect Jan. 1, 2024) available at https://hcai.ca.gov/wp-content/uploads/2023/07/CMIR-Regulations-for-Workshop.pdf

[4] New York State budget for State Fiscal Year 2023-2024, available at https://nyassembly.gov/Reports/WAM/AssemblyBudgetProposal/2023/2023AssemblySummary.pdf