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DOH Issues Guidance on New York's Material Health Care Transaction Law

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Nearly two years ago, and as previously discussed in a Proskauer alert, New York enacted Public Health Law Article 45-A (the "Material Transactions Law"), which requires reporting of certain material health care transactions. Last month, the New York State ("NYS") Department of Health ("DOH") published long-awaited guidance concerning the reporting obligations under the Material Transactions Law.

As a general matter, "health care entities" party to a "material transaction" must notify DOH at least 30 days before the transaction's closing. This notice is then posted on the DOH website and shared with the Office of the NYS Attorney General.

DOH's recent guidance concerning the Material Transactions Law is categorized into four distinct topics: (i) entities required to report; (ii) the definition of "material transaction"; (iii) assessing impacts of the transaction; and (iv) the public comments process.

Health Care Entities Subject to the Material Transactions Law

The guidance clarifies that the Material Transaction Law applies to a broad range of businesses in the health care sector, including, but not limited to:

- physician practices or groups;
- management services organizations ("MSOs");
- health insurance plans;
- provider-sponsored organizations; and
- health care facilities, organizations and plans providing services in NYS (this includes out?of-state entities if the transaction impacts in?state gross revenues above the threshold amount).

DOH cautioned that the above list is not exhaustive.

The guidance further clarifies that DOH considers the following entities to be “health care entities” covered by the Material Transactions Law: dental practices, clinical laboratories, pharmacies, independent practice associations and accountable care organizations.

What Constitutes a Material Transaction?

The Material Transactions Law defines a material transaction, in part, as a transaction (or series of related transactions within a rolling 12-month period) that results in a health care entity increasing its total gross in-state revenues by $25 million or more.

The recent guidance underscores that such transactions include, but are not limited to:

- mergers, acquisitions and transfers of assets or control;
- affiliation agreements and contracts;
- 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 of control, such as contracting for services commonly provided through a management or administrative services agreement between a practice and an MSO; and
- formation of joint ventures, partnerships or management organizations for administering contracts with health plans or providers.

The recent guidance clarifies that “material transaction” includes “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 of control, such as contracting for services commonly provided through a management or administrative services agreement between a practice and an MSO.”

Materiality Threshold

The DOH guidance provides two specific examples to distinguish between a single transaction and a series of related transactions. If the transaction is a single transaction, the parties must assess whether the entity(ies) to be acquired/merged into the surviving entity will have had $25 million or more of combined gross in-state revenue in the prior 12?month period from the anticipated closing date (“Lookback Period”). Notably, neither the DOH guidance nor the Material Transactions Law define “gross in-state revenue.”

If the transaction is a series of related transactions, the parties must assess the revenue associated with each related transaction that took place, or will take place, during the Lookback Period. Specifically, for each of those transactions, the parties must assess the added gross in-state revenue that is attributable in the Lookback Period based on the actual or anticipated closing date of that particular transaction. The series of related transactions will be subject to PHL Article 45-?A if the total added combined gross in-state revenue calculated across all of these transactions is $25 million or more. Notably, neither the DOH guidance nor PHL Article 45-A define what constitutes a “series” of related transactions.

Assessing Impacts of the Transaction; Detailed Electronic Form Is Forthcoming

Similar to other state transaction laws, like California, entities that are subject to New York’s Material Transactions Law must conduct an impact assessment and submit information concerning the transaction’s impact to the State.

In the guidance, DOH makes clear that an electronic Material Transactions Notice Form is forthcoming, “which may require more specific information to conduct [the] impact assessment.” In the meantime, DOH instructs parties to “provide a good faith assessment of the impact of the proposed transaction.” The DOH guidance provides a variety of factors that parties should assess and potentially report, including whether:

- services will be eliminated, reduced, added or expanded (in terms of staffing available or available hours/days of service);
- contracts with certain insurance carriers will be added or eliminated as a result of the transaction, including whether Medicaid participation will be impacted;
- locations will open or close, or expand or reduce service availability;
- healthcare staffing changes are expected (i.e., staff additions or cuts);
- contracted commercial payor rate increases are anticipated;
- changes in the share of services provided to historically underserved populations are anticipated; and
- the parties expect any increase in market consolidation (as evidenced by changes in market share in any region of the state).

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