New Disclosure and Notice Requirements for New York Physician Practice Transactions

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May 4, 2023 | **CLIENT ALERTS**

The 2023-2024 New York State budget has enacted significant new mandatory disclosure and notice laws for certain transactions involving physician practices and other health care organizations. This new law – Article 45-A of the Public Health Law – marks the first time private physician practices in New York have been subject to specific regulatory processes in connection with ownership and transactional matters. Historically, New York's regulation of physician practices' ownership and contractual relationships has been generally limited to fee-splitting rules and the corporate practice of medicine doctrine, which is not embodied in any specific statute. The law will take effect August 1, 2023. Article 45-A enters the New York health care landscape at a time when physician practice acquisitions by privately funded investment groups, venture capital, and others continue to rise. The new law also follows the national trend of increased legislation and scrutiny surrounding private equity and management company relationships with physician and health care practices.

Beginning on August 1, 2023, any "material transaction" involving a "health care entity" must be disclosed to the Department of Health at least 30 days prior to the closing date. The Department of Health is required to adopt a

process for the required disclosure and notice and may adopt regulations necessary for implementing the new law by August 1, 2023. It is unclear whether or when the New York State Department of Health will issue such guidance or proposed regulations.

Affected health care entities include, but are not limited to, physician practices and groups, and management services organizations that provide all or substantially all of the administrative or management services to one or more physician practices, provider-sponsored organizations, health insurance plans, or other health care facility, organization, or plan providing health care services in this state.

Transactions affected by the new law include:

- Mergers with a health care entity
- Acquisitions of a physician practice (whether by sale of assets or equity or the mere transfer of control by contract)
- Acquisitions of management services companies that provide services to physician practices, health insurance plans, or other health care facilities (whether by sale of assets or equity or the transfer of control by contract)
- Affiliation agreements between a physician practice and any other person
- Formation of a joint venture, ACO, parent organization, or MSO for the purpose of administering contracts with health plans, pharmacy benefit managers, or health care providers (which would seem to include New York independent practice associations ("IPAs") which already require the approval of the Department of Health).

Notably, Article 45-A will not apply to "de minimis transactions" which are defined as transactions that result in a health care entity increasing its total gross in-state revenues by less than $25 million. It also does not apply to transactions that are subject to Department of Health review under other provisions of the New York Public Health Law.

The breadth and scope of these definitions and the exception for de minimis transactions remain unclear and subject to interpretation and further analysis. That said, it does not expressly apply to dentists or nurse practitioners (who can practice independently in New York), even though such other professions have been the target of private equity acquisitions for many years. It is possible that these professions could be included under the forthcoming Department of Health regulations or guidance. It is also unclear how the Department of Health intends to interpret and implement the de minimis transaction definition. However, it may provide an important exception for smaller transactions and traditional physician changes of ownership from one physician to another.

The form and substance of the required notice will be developed by the Department of Health, but at minimum must include:

- the names of the parties to the material transaction and their current addresses;
- copies of any definitive agreements governing the terms of the material transaction, including pre and post-closing conditions;
- identification of all locations where health care services are currently provided by each party and the revenue generated in the state from such locations;
- any plans to reduce or eliminate services and/or participation in specific plan networks;
- the closing date of the proposed material transaction;
- a brief description of the nature and purpose of the proposed material transaction including;

- 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.

Civil penalties apply for each day that the parties fail to provide the required notice to the Department of Health. The notice provided to the Department of Health will not be subject to disclosure under the state Freedom of Information Law, providing the parties to the transaction with some level of comfort regarding the privacy of the transaction for physician owners. However:

- the Department of Health will provide a copy of the notice submitted to the state's Antitrust, Health care, and Charities Bureaus of the Office of the Attorney General; and
- during the 30-day period prior to the closing date, the Department of Health will publish on its website a summary of the proposed transaction, an explanation of the groups or individuals likely to be impacted by the transaction, information about services currently provided by the health care entity and commitments by it to continue to such services, and any services which will be reduced or eliminated.

This internal disclosure will undoubtedly open up the potential for a review of the transaction for other legal issues and the potential for ongoing scrutiny of the organization's activities post-closing. Additionally, the public will be permitted to submit comments on the proposed transaction. It is unclear what utility these comments will provide, as Department of Health approval for the transaction is not required under the statute.

Article 45-A will likely increase the cost of physician practice transactions and inject new and additional uncertainties into the transaction process. We anticipate it will be a busy summer as many transactions in progress will likely expedite their timelines in advance of August 1, 2023.

Article 45-A, as enacted, falls shorts of the significant oversight the governor's original budget proposal included. Under the original proposal, transactions involving physician practices would have been subject to the Department of Health's review and approval, similar to the approval process required for ambulatory surgery centers, home care agencies, nursing homes, and other licensed facilities. Nevertheless, this new law is a strong reminder for New York that the corporate practice of medicine doctrine remains alive and well. The corporate practice doctrine is grounded in the public policy that, to maintain the integrity of the profession and the services provided to the public, the professional judgment of physicians and health care professionals should not be subject to the direction and control of non-professionals or otherwise beholden to the private interests of non-professionals. As such, New York prohibits non-physicians from owning medical and other professional practices.

The Lippes Mathias Health Care Team continues to monitor the development and interpretation of Article 45-A of the Public Health Law and the forthcoming Department of Health guidance and/or regulations. If you require assistance or have questions regarding this new law, please contact a member of our Health Care Team.

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