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State Pre-Merger Notification Requirements for Healthcare Transactions

Increased Regulatory Scrutiny for Small, Sub-HSR Transactions

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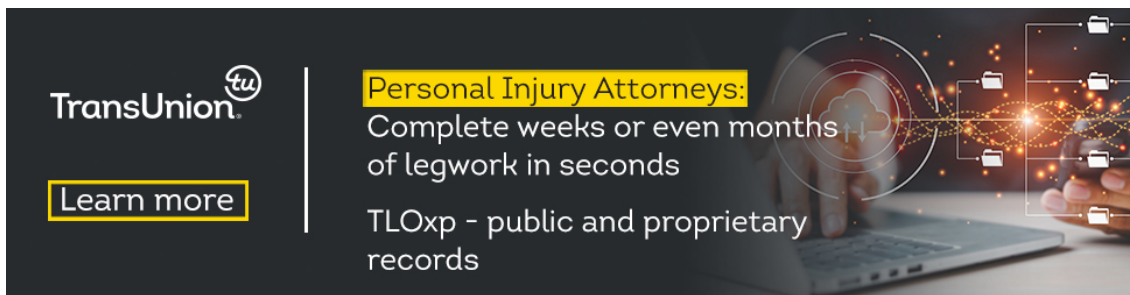


Antitrust regulators have long expressed concern with mergers among healthcare providers. The Hart-Scott-Rodino (HSR) Act gives the Federal Trade Commission (FTC) and the Department of Justice's Antitrust Division (DOJ) joint jurisdiction to conduct pre-merger review of many transactions with a transaction value that exceeds the HSR filing threshold (currently \$111.4 million, but adjusted annually). Although there are exceptions, the FTC is generally the federal agency that conducts the HSR review of transactions between healthcare providers. However, only very large provider transactions such as hospital mergers or acquisitions by a hospital of a large physician group tend to exceed this value threshold and require an HSR filing.

In response to concerns that smaller transactions with potentially significant effects on local healthcare markets could elude antitrust review since they do not require an HSR filing, ¹ a growing number of states have implemented, or are in the process of implementing, their own pre-merger notification requirements for healthcare transactions. These state notification requirements allow the respective state Attorney General's offices (or other administrative agencies) to review certain healthcare transactions prior to closing. As of January 1, 2024, thirteen states— California, Colorado, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, Nevada, New York, Oregon, Rhode Island, Vermont, and Washington —will have notification requirements in effect for healthcare transactions.

These statutes do not substantively change the standard upon which transactions may be challenged. Merger challenges by state Attorneys General will still need to rely upon traditional state or federal antitrust laws such as section 7 of the Clayton Act, which prohibits transactions that are likely to substantially lessen competition, or section 2 of the Sherman Act, which prohibits monopolization and attempts to monopolize. Providers and other healthcare businesses considering transactions must now, however, consider the potential need for state antitrust filings even if their transactions fall below the HSR filing thresholds. Moreover, the recent state laws vary considerably in their filing requirements and deadlines. Parties contemplating transactions that affect healthcare markets in multiple states will, therefore, need to be particularly vigilant that their filings meet specific state requirements and that those requirements are factored into the transaction timetable. Importantly as well, California, Massachusetts, Minnesota, Oregon, and Rhode Island, in at least some circumstances, require notification of a transaction if only *one* party is a covered healthcare entity. Thus, private equity buyers engaging in acquisitions of covered healthcare entities will need to be aware of filing requirements and may need to submit a filing in some jurisdictions.

Following is an overview ² of the current state notification landscape and how it differs from the current HSR filing requirements and from those of other states.



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Healthcare Transaction Notification Statutes Going Into Effect in 2024

California

On November 23, 2023, California's Office of Health Care Affordability (OHCA) published revised and likely final regulations regarding California's new transaction notice requirement that will apply to healthcare transactions closing on or after April 1, 2024. ³

Covered Transactions. Reporting requirements will apply to healthcare entities that are parties to material change transactions that meet certain size thresholds. Healthcare entities are defined as payors, providers, fully integrated delivery systems, pharmacy benefit managers, and any affiliates or entities that control or govern a healthcare entity (i.e., private equity or financial investors in healthcare entities). ⁴ The material change requirement is triggered in eight defined types of transactions: ⁵

- 1 A transaction with fair market value of \$25 million or more;
- 2 A transaction is likely to increase annual California-derived revenue of a healthcare entity that is party to the transaction by at least \$10 million or 20% of annual California-derived revenue;
- 3 A transaction involving the sale, transfer, lease, exchange, option, encumbrance, or other disposition of 25% or more of the total California assets of the submitter;
- 4 A transaction involving transfer of control, responsibility, or governance of the submitter;
- 5 A transaction will result in an entity contracting with payors on behalf of consolidated or combined providers and is likely to increase the annual California-derived revenue of any providers in the transaction by \$10 million or more or 20% or more of annual California-derived revenue;
- 6 A transaction involving the formation of a new healthcare entity, affiliation, partnership, joint venture, or parent corporation for the provision of health services in California that is projected to have at least \$25 million in California-derived annual revenue or control \$25

million or more in California assets related to providing healthcare services;

- 7 A transaction that is part of a series of related transactions for the same or related healthcare services occurring over the past 10 years involving the same healthcare entities or entities affiliated with the same entities. Importantly, the proposed transaction and its related transaction will constitute a single transaction for purposes of determining the size thresholds discussed below.
- 8 The transaction involves the acquisition of a healthcare entity by another entity and the acquiring entity has consummated a similar transaction in the last 10 years with a healthcare entity that provides the same or related healthcare services. Importantly, the proposed transaction and its related transaction will constitute a single transaction for purposes of determining the size thresholds discussed below.

Size Thresholds. Healthcare entities engaging in a defined material change transaction must provide notice if one of them meets any of the following thresholds: 6

- 1 One party is a healthcare entity with at least \$25 million in annual California-derived revenue or owns or controls California assets of at least \$25 million; or
- 2 One party is a healthcare entity with at least \$10 million in annual California-derived revenue or owns or controls California assets of at least \$10 million, and is involved in a transaction with a party that has annual California-derived revenue of at least \$25 million or controls California assets valued at more than \$25 million; or
- 3 One party is a healthcare entity that is located in or serves at least 50% of patients who reside in a designated mental health or primary care health professional shortage area.

Content of Notification. Parties must submit a substantial amount of information, including detailed descriptions of and information about (1) all entities involved in the transaction; (2) the proposed transaction, including the rationale for the transaction, benefits to the public, and expected competitive impacts; (3) the anticipated closing date; and (4) similar transactions of the parties over the past 10 years. Parties must also submit a variety of documents with their notice, such as term sheets, documentation showing valuation of transaction, organizational charts and financial records. (7)

HSR Filing Included in Notification. If a party was required to make an HSR filing, a copy of that filing must be included as part of the state filing.

Notice and Waiting Period. Parties must provide notice to the OHCA at least 90 days before closing for transactions expected to close on or after April 1, 2024.

(8) If the OHCA determines that it will not conduct a cost and market impact review, the OHCA will notify the parties of that decision within 45 days after receiving the parties' complete filing. If the OHCA determines it will conduct a cost and market impact review, the OHCA will notify the parties of that decision within 60 days after receiving the parties' complete filing. (9) The 45-day and 60-day periods are tolled, however, under certain circumstances, such as if the OHCA has requested additional information from the parties. The OHCA shall complete its cost and market impact review within 90 days, but may extend the review period by an additional 30 days if it believes it needs more time or if other conditions apply. (10) A submitter may request an expedited review if it can demonstrate severe financial distress or a significant reduction in the provision of critical health services. (11)

Public Access to Filing. The application is public and posted on the Office's website unless the submitter designates documents or information as confidential and the OHCA accepts the confidential designation at their discretion. (12)

Exemptions. Typical, day-to-day transactions and situations in which both parties are under common control are exempt from the filing requirements.

Illinois

Illinois' notification requirement will require submissions to the Illinois Attorney General for a broad range of healthcare transactions closing on or after January 1, 2024, which is when the law goes into effect. [14](#)

Covered Transactions. Healthcare facilities that are parties to covered transactions that meet certain size thresholds are subject to the notice requirement. [15](#) Healthcare facilities are defined to include hospitals, surgical treatment centers and certain kidney disease treatment centers, physician organizations, physician-hospital organizations, independent practice associations, provider networks, and accountable care organizations. [16](#) Covered transactions are defined as any merger, acquisition, or contracting affiliation between two or more healthcare facilities or provider organizations. [17](#)

Size Thresholds. The notification law applies to any healthcare facility or provider organization that is headquartered or does business in Illinois, regardless of transaction size. [18](#) If one party is considered out-of-state, the parties must provide notice only if the out-of-state entity presently generates \$10 million or more in annual revenue from patients residing in Illinois. [19](#)

Contents of Notification. Parties may meet their notification obligations in one of three ways: (1) simultaneously submitting to the Illinois Attorney General's office the parties' HSR filing, if one was required; (2) filing an Application for Change of Ownership, which asks for narrative descriptions of the change in ownership and requires parties to identify the organizational structures of involved parties, with the Illinois Health Facilities and Services Review Board; or (3) submitting written notice to the Illinois Attorney General's office that includes a description of the nature and purpose of the proposed transaction. [20](#)

HSR Filing Included in Notification. A party can satisfy the filing requirement by submitting a copy of the party's HSR filing, but it is not required to do so. [21](#)

Notice and Waiting Period. Parties must provide notice at least 30 days prior to closing. (22) The Attorney General may make any request for additional information from the parties within 30 days of the date notice is received, in which case the transaction may not proceed until 30 days after the parties have substantially complied with such requests. (23) While any further request for additional information by the Attorney General need not further delay the transaction from proceeding, this statute does not preclude the Attorney General from conducting a further investigation or enforcing State or federal antitrust laws at a later date. (24)

Public Access to Notification. The notification is provided confidentiality and not available to the public. (25)

Already-Effective Healthcare Transaction Notification Statutes

Colorado

Colorado's statute, enacted in 2008, requires hospitals that are parties to a covered transaction to provide notice to the Colorado Attorney General 60 days prior to closing. (26) The Colorado statute makes distinctions in the contents of the notice and the Attorney General's criteria and process for review depending on whether the parties are non-profit or for-profit entities.

Covered Transactions. Covered transactions are defined as those that would result in the sale, transfer, lease, exchange or other disposition of 50% or more of the assets of a hospital. A series of transactions taking place within a five-year period that would result in the aggregate of the transfer of 50% or more of a hospital's assets is also considered a covered transaction. (27)

Size Thresholds. None.

Contents of Notification. The content of the notice varies depending on whether the parties to the transaction are for-profit or non-profit entities, although notices for all covered transaction require the transacting parties to

certify that they will provide public notice of the transaction within seven days after notifying the Attorney General. For covered transactions involving a nonprofit hospital and another nonprofit entity, the notice must include a statement on the charitable purpose of each nonprofit entity entering into the transaction and explain the relationship between those stated purposes and the hospital involved in the transaction. (28) For covered transactions involving a non-profit hospital and a for-profit entity, the notice must include all proposed agreements relating to the proposed transaction, all agreements regarding collateral transactions that relate to the principal transaction, any reports of financial and economic analysis that the nonprofit entity reviewed or relied on in negotiating the proposed transaction, and an explanation of how the completed transaction will comply with a list of requirements for the transaction, including assurance that the transaction is in the public interest and results in continuing access to healthcare services. (29)

HSR Filing Included in Notification. No.

Notice and Waiting Period. Parties to a covered transaction must provide written notice of the transaction to the Colorado Attorney General at least 60 days prior to closing. (30) For transactions involving a non-profit hospital and a for-profit entity, the Attorney General can extend the review period for an additional 90 days if the Attorney General determines, for good cause, that additional time is warranted and notifies the parties in writing. (31)

Public Access to Notification. Except for documents the Attorney General determines are confidential as a matter of law, the documents filed with the notice are available to the public for review and copying. (32)

Connecticut

Connecticut's pre-merger notification statute has been in effect since 2014 and requires parties to certain transactions involving group practices and other healthcare providers to provide notice to the Connecticut Attorney General 30 days prior to closing. (33)

Covered Transactions. Parties to transactions that result in a material change to the business or corporate structure of a group practice are subject to the notice requirement. A group practice is an organization of two or more physicians who render professional services through the group and share overhead costs. The statute provides detailed criteria for the definition of material changes, but, at a general level, these include mergers, consolidations or other types of affiliations that involve the acquisition of all or substantially all of the target's assets. (34) Additionally, any person conducting business in Connecticut that files an HSR notification where a hospital, hospital system or other healthcare provider is a party to the transaction must, at the same time, provide written notification to the Connecticut Attorney General. (35)

Size Thresholds. None.

Contents of Notification. Required information includes a narrative description of the nature of the proposed transaction, the names and specialties of each physician subject to the proposed transaction, the names of the business units that will provide services after the transaction, a description of the services to be provided at each location, and the primary service area served by each location. (36) A "primary service area" is defined as the smallest number of zip codes from which a group practice draws at least 75% of its patients. (37)

HSR filing Included in Notification. Any person who conducts business in Connecticut and makes an HSR filing related to the acquisition of a healthcare provider or hospital must also provide notice of the filing to the Connecticut Attorney General, and upon request by the AG, must provide a copy of the filing. (38)

Notice and Waiting Period. The statute requires that parties submit notification to the Connecticut Attorney General 30 days prior to closing. (39) For any transaction that also requires an HSR filing, the parties must file notice with the Connecticut Attorney General at the same time they make their HSR filing.

(40)

Public Access to the Notification. The notification and any information provided with the notification will be maintained in confidence by the Connecticut Attorney General, is exempt from the Connecticut Freedom of Information Act and cannot be disclosed to the public. (41)

Hawaii

Hawaii's statute, enacted in 1977 and amended in 1998, requires parties to a transaction involving the acquisition of a hospital to apply for approval from the State Health Planning and Development Agency and provide 90 days' notice to the Hawaii Attorney General. (42)

Covered Transactions. Parties engaged in a transaction involving the acquisition of a hospital are subject to the notice requirements. A hospital is defined as an institution with an organized medical staff that admits patients for inpatient, diagnosis, observation and treatment, but excluded from the definition are public health facilities. (43)

Size Thresholds. None.

Contents of Notification. The notice to the Attorney General must describe the proposed acquisition, including any change in ownership of tangible or intangible assets. (44)

HSR Filing Included in Notification. No.

Notice and Waiting Period. Parties must provide notice to the Attorney General 90 days prior to closing. (45)

Public Access to Notification. The application and notice are considered government records. (46)

Massachusetts

Massachusetts requires providers and provider organizations who are parties to certain transactions that result in a material change to their operations or structure to submit a notice to the Health Policy Commission, Center for Health Information and Analysis, and Attorney General at least 60 days prior to closing. (47)

Covered Transactions. Provider or provider organizations that are party to a transaction that results in a material change to its operations or structure are subject to the notice requirements. A provider includes any entity that is qualified under the laws of Massachusetts to perform or provide healthcare services. A provider organization is any entity that represents one or more providers in contracting with carriers for the payment of healthcare services.

(48) Material changes include, but are not limited to, a corporate merger, acquisition or affiliation of a provider or provider organization and a carrier; a merger or acquisition of hospitals or hospital systems; acquisition of insolvent provider organizations; and a merger or acquisition of provider organizations that will result in a provider organization having a near-majority market share in a given service or region. (49)

Size Thresholds. None for a covered transaction involving a carrier, hospital or hospital system. For covered transactions between providers or provider organizations, notice is only required if the transaction would result in an increase in annual net patient service revenue of the provider or provider organization of 10 million or more, or in the provider or provider organization having a near-majority of market share in a given service or region. Clinical affiliations between two or more providers or provider organizations that each had annual net patient service revenue of \$25 million or more in the preceding year also require notice. (50)

Contents of the Notification. Parties are required to complete a Notice of Material Change Form, which is available on the Attorney General's website. Although the notice form is not especially onerous, it requires parties to describe the nature and objectives of the proposed material change, its anticipated impact, and any additional changes that the parties are planning.

HSR Filing Included in Notification. No.

Notice and Waiting Period. Parties must provide at least 60 days' notice prior to the closing. (51)

Public Access to Notification. Nonpublic information and documents are kept confidential, do not become part of the public record, and are exempt from disclosure. (52)

Minnesota

Minnesota's statute, which was recently amended and expanded in May 2023, requires healthcare entities that are parties to a covered transaction to provide notice to the Commissioner of Health and the Minnesota Attorney General either 30 or 60 days prior to closing, depending on the size of the transaction. (53)

Covered Transactions. Healthcare entities that are party to certain transactions are required to provide notice. Healthcare entities include hospitals, hospital systems, medical foundations, and provider group practices licensed or authorized to operate under Minnesota law. (54) The statute further defines a transaction as a single action, or a series of actions within a five-year period, which occurs in part within the state of Minnesota or involves a healthcare entity formed or licensed in Minnesota. (55)

Size Thresholds. Transactions that meet either of the following thresholds require notice: (1) the healthcare entity involved has an average annual revenue between \$10 million and \$80 million (Small Transactions); or (2) the healthcare entity involved has an average annual revenue of at least \$80 million per year (Large Transactions). (56)

Contents of Notification and Waiting Period. For Small Transactions, parties must provide basic details of the transaction, including the leadership and ownership structures of the transacting parties, planned service areas and closures, and current and future workforce information. (57)

For Large Transactions, the parties must provide the current governing documents for all parties involved in the transaction, the transaction agreement, all expert or consultant reports or valuations conducted in evaluating the transaction, copies of all filings submitted to federal regulators, audited and unaudited financial statements, tax filings, a detailed market analysis, and collateral agreements related to the transactions, such as leases and service contracts. (58)

Notice and Waiting Period. For Small Transactions, parties must provide notice to the Commissioner of Health and the Minnesota Attorney General 30 days prior to closing. For Large Transactions, parties must provide notice 60 days prior to closing. The attorney general may extend the notice and waiting period for an additional 90 days by notifying the healthcare entity in writing of the extension. (59) The parties may not close during those 90 days. The attorney general or commissioner may hold public listening sessions or forums to obtain input on the transaction from providers or community members who may be impacted by the transaction. (60) The Attorney General or Commissioner may bring an action in district court to compel compliance with the notice, waiting period, disclosure, and submission requirements. (61) However, the attorney general may waive all or any part of the waiting period, all or any part of the disclosure requirements, and all or any part of the submission requirements. (62)

HSR Filing Included in Notification. Yes. (63)

Public Access to Notification. The state Attorney General or Commissioner may hold public listening sessions; however, documents submitted with the notice are kept confidential.

Nevada

Nevada's statute requires group practices (i.e., any medical practice with two or more practitioners) and health carriers (i.e., insurers) that are parties to a covered transaction to provide notice to the Nevada Attorney General 30 days prior to closing. (64)

Covered Transactions. Nevada’s statute covers transactions involving “group practices” and “health carriers. Group practices are defined as two or more practitioners organized to provide medical services under Nevada law where each practitioner regularly provides healthcare services, the majority of services are provided by the group practice, and the practitioners share overhead expenses. (65) Health carriers are defined as any entities subject to the insurance laws and regulations of Nevada that provide health insurance services. (66) Notice is required if the transaction would qualify as a “material change” to the business. (67) A “material change” includes a merger, consolidation, or affiliation of a group practice or health carrier with another group practice or health carrier; the acquisition of “all or substantially all” of the properties and assets of a group practice or the capital stock, membership interests, or other equity interest of a group practice or health carrier; the employment of all or substantially all of the practitioners in a group practice; and the acquisition of one or more insolvent group practices. (68) A material change does not include businesses under common ownership or those with a contracting relationship established before October 1, 2021. (69)

Size Thresholds. Notice is required only if a qualifying transaction would cause a group practice or health carrier to provide a given geographic market 50% or more of any healthcare service. (70)

Contents of Notification. The key notice requirements include, among other things, a brief description of the nature of the proposed relationship among the parties; the names and specialties of each practitioner working for the group practice and is anticipated to work with the practice group post-transaction; the names of the business entities anticipated to provide healthcare services or health carrier services; each anticipated location where a healthcare service or health carrier service will be provided; a description of the services to be provided at each location; and the primary service area to be served by each location. A copy of the filing must be submitted to the state Attorney General. (71) Parties that submit a HSR filing need not submit separate notices providing this information. (72)

HSR Filing Included Within Notification. Parties must submit any HSR filings to the state Attorney General. (73)

Notice and Waiting Period. The statute requires any covered person or entity conducting business in the State to give 30 days' notice prior to closing a covered transaction. (74)

Public Access to Notification. All information received by the state Attorney General is confidential. (75)

New York

New York's statute requires providers and provider organizations who are parties to certain transactions that result in a material change to their operations or structure to submit a notice to the New York Department of Health at least 30 days prior to closing. (76)

Covered Transactions. New York's statute covers transactions by healthcare entities, which it broadly defines to include any physician practices, physician groups, management service organizations or similar entities providing all or substantially all of their administrative or management services under contract with one or more physician practices, provider-sponsor organization, health insurance plan, or any other kind of healthcare facility, organization, or plan that provides healthcare services in New York. (77) Insurers authorized to do business in New York, along with pharmacy benefit managers, are excluded from the definition. (78) Notification is required for "material transactions," which are defined as a single or a series of related transactions in a rolling twelve month period that constitute a merger with a healthcare entity; an acquisition of one or more healthcare entities; an affiliation agreement or contract formed between a healthcare entity and another person; or the formation of partnerships, joint ventures, accountable care organizations, parent organizations, or management services organizations for the purpose of administering contracts with health plans, third-party administrators, pharmacy benefit managers, or healthcare providers as prescribed by the commissioner by regulations. (79) Material transactions do not include a

clinical affiliation of healthcare entities for the purposes of collaborating on clinical trials or graduate medical educational programs. (80)

Size Thresholds. Notice is not required for a transaction or series of transactions that result in a healthcare entity increasing its total gross in-state revenues by less than \$25 million. (81)

Content of Notification. Parties must provide a description of the purposes of the transaction, plans to reduce or eliminate services and/or participating in specific plan networks, anticipated impact on costs, and the parties' plans to address those impacts. (82)

HSR Filing Included in Notification. New York does not explicitly request a copy of the parties' HSR filings if they are required.

Notice and Waiting Period. Parties must notify the state Department of Health at least 30 days prior to closing a covered transaction.

Public Access to Notification. The New York State Department of Health will post on its website within the 30-day review period 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 healthcare entity and whether services will be continued to eliminated, and details about how the public can submit comments. (83) Following submission, the Department of Health will forward the filing to the state Attorney General for determination whether to take further action. (84)

Oregon

Oregon's statute requires healthcare entities (including all providers and health benefit plans, Medicare Advantage plans, coordinated care organizations, prepaid managed care health service organizations, and any other entity that provides healthcare services as a primary function) who are parties to certain transactions that result in a material change to their operations or structure to

submit a notice to the Oregon Health Authority at least 180 days prior to closing. (85)

Covered Transactions. Oregon's pre-merger notifications are governed by the Health Care Market Oversight program. The relevant statute covers "health care entities," which are defined to include individual health professionals licensed or certified in Oregon, hospitals, carriers that offer a health benefit plan in Oregon, Medicare Advantage plans, coordinated care organizations, prepaid managed care health service organizations, and any other entity that provides healthcare services as a primary function. (86) It excludes long-term care and residential facilities as well as behavioral health facilities. (87) The notice requirement applies only to "material changes," which are defined around size thresholds. Exempted from notice requirements are:

- A clinical affiliation of healthcare entities formed for the purpose of collaborating on clinical trials or graduate medical education programs;
- A medical services contract or an extension of a medical services contract;
- An affiliation that does not impact corporate leadership *and* is necessary to adopt advanced value-based payment methodologies to meet the healthcare cost growth targets under Oregon's Health Care Cost Growth Target program;
- Contracts under which one healthcare entity, for and on behalf of a second healthcare entity, provides patient care and services or provides administrative services relating to, supporting, or facilitating the provision of patient care and services, if the second healthcare entity maintains responsibility and control over patient care and services *and* bills and receives reimbursement for the patient; or
- One party is a health center defined in 42 U.S.C. 254b unless the transaction would result in the party no longer qualifying as a health center under 42 U.S.C. 254b.

Size Thresholds. The pre-merger filing requirements apply only to “material change” transactions, defined as transactions in which one party has over \$25 million in Oregon-derived net patient or premium revenue and another party has over \$10 million in Oregon-derived revenue or, for new entities, is projected to have at least \$10 million in Oregon-derived revenue in the first full year of operation. (88) Revenue is defined as the total amount of revenue received for patient care and services and the gross amount of premiums received by a healthcare entity that are derived from health benefit plans. (89) For transactions involving an in-state and an out-of-state entity, a transaction qualifies as a material transaction if it would otherwise meet the revenue threshold requirements (i.e., it would hit the revenue thresholds from revenue outside Oregon) and “may result in increases in the price of health care or limit access to health care services” in Oregon. (90)

Contents of Notification. The contents of a filing are governed by Oregon Health Authority (OHA) rulemaking. The current rules require filing forms and materials that describe general information about the transaction, the entities involved, and the impact from the proposed transaction on the cost of healthcare and patients’ access to it. (91)

Notice and Waiting Period. Notice to the OHA is required at least 180 days prior to close of the transaction. (92) Within 30 days of receiving a submitted notification, OHA conducts a preliminary review of the notification. Within the 30-day period, OHA will either approve the transaction or may subject it to “comprehensive review” if it develops concerns that the transaction is contrary to the public interest. (93) The Director of the OHA can seek any remedy available at law to enjoin the transaction based on findings. (94) Given the potential length of the review period, parties contemplating a transaction should consider notifying OHA as early as practicable.

Public Access to Notification. A review board may hold up to two public hearings to seek public input and otherwise engage the public before making a determination on the proposed transaction. At least 10 days prior to the public hearing, the authority shall post to the authority’s website information about

the public hearing and materials related to the material change transaction.

95 The authority shall maintain the confidentiality of all confidential information and documents that are not publicly available that are obtained in relation to a material change transaction and may not disclose the information or documents to any person, including a member of the review board, without the consent of the person who provided the information or document. 96

Rhode Island

Rhode Island's statute requires all entities operating as hospitals involved in a transfer of at least a 20% or more ownership interest with a for-profit or not-for-profit corporation to provide notice to the Rhode Island Attorney General.

97 Parties should plan to provide at least 30 days before closing for the review period.

Covered Transactions. Under the Hospital Conversion Act, all entities operating as hospitals under Rhode Island law that are involved in a transaction with a for-profit or not-for-profit corporation must report the transaction to the Rhode Island Department of Health and to the Office of the Attorney General when they are involved in the transfer of 20% or more of ownership, assets, membership interest, authority, or control of a hospital in Rhode Island. 98

Size Thresholds. None stated.

Contents of Notification. All parties involved must file two copies of the application with both agencies. An initial application requires information about the parties' background and structure, patient statistics for the last three years, agenda and minutes of all board meetings related to the transaction, conflict of interest statements, the transaction's effect on the provision of healthcare, and its impact on workers and labor markets. 99

HSR Filing Included in Notification. Rhode Island does not require submission of an HSR filing if one was required.

Notice and Waiting Period. After the submission, the agencies will review the application and within 30 days of receipt will jointly notify the applicants whether the application is accepted; if not, they will specify any additional required information. (100) After the agencies accept the application, they will publish notice of the application in a newspaper of general circulation in the state and will notify by mail any person who has requested notice of the filing of the application to allow for a public comment period of 60 days. (101) The agencies will respond with their decision to approve the transaction, approve the transaction with remedies, or seek to block the transaction within 180 days of the date of acceptance of the application. (102)

Vermont

Vermont's statute requires all hospitals acquiring a medical practice (i.e., a business with one or more practicing physicians) to provide notice to the Vermont Attorney General at least 90 days before closing. (103)

Covered Transactions. Vermont's statute covers hospitals, defined to include a general hospital or hospital facility licensed under Vermont law. (104) It covers any purchase or transfer through which a hospital will own or control the business of a medical practice, defined as a business with one or more physicians practicing medicine. (105)

Size Threshold. None stated.

Content of the Notification. Filings must include "at least" the name and address of the hospital acquiring the medical practice and contact information for a representative of the hospital; and the name and address of the medical practice being acquired and contract information for a representative of the medical practice. (106)

HSR Filing Included in Notification. Not stated.

Notice and Waiting Period. Parties must submit notification to the state Attorney General at least 90 days or as soon as practicable prior to the effective

date of the transaction. (107)

Public Access to Notification. Filings are exempt from public inspection and copying and shall be kept confidential except to the extent necessary to allow the Attorney General to perform an inquiry into potentially anticompetitive practices. (108)

Washington

Washington's statute requires parties to a transaction involving two or more hospitals or other provider organizations to provide notice to the Washington Attorney General at least 60 days before closing. Potential size exemptions exist for transactions involving an out-of-state party. (109)

Covered Transactions. Washington's statute covers all parties to a transaction that results in a material change involving two or more hospitals, hospital systems, or provider organizations. (110) A material change means a merger, acquisition, or contracting affiliation, provided that the entities involved did not previously have common ownership or a contracting affiliation. (111) A hospital means any institution, place, building, or agency that provides accommodations, facilities, and services over a continuous period of 24 hours or more for observation, diagnosis, or care of two or more individuals. A hospital system includes a parent corporation of one or more hospitals and any entity affiliated with such parent corporation through ownership or control, or a hospital and any entity affiliated with such hospital through ownership. A provider organization is a corporation, partnership, business trust, association, or organized group of persons, whether incorporated or not, which is in the business of healthcare delivery or management and that represents seven or more healthcare providers in contracting with carriers or third-party administrators for the payments of healthcare services. A provider organization includes physician organizations, physician-hospital organizations, independent practice associations, provider networks, and accountable care organizations. (112)

Size Thresholds. There is no size threshold for Washington-based parties. If a transaction involves a Washington-based party and an out-of-state party, the transaction is covered if the out-of-state party generates \$10 million or more from healthcare service revenue from patients residing in Washington. ¹¹³

Content of the Notification. The parties must provide written notice to the state Attorney General that includes the names of the parties and their current business addresses; identification of all locations where healthcare services are currently provided by each party; a brief description of the nature and purpose of the proposed material change; and the anticipated date of the proposed material change. Parties may also submit additional materials voluntarily. ¹¹⁴

HSR Filing Included in Notification. Parties must also submit a copy of their HSR filing to the state agencies if an HSR filing was made. ¹¹⁵

Notice and Waiting Period. Not less than 60 days prior to close, the parties to the transaction must submit written notice to the attorney general of such material change. ¹¹⁶ The Attorney General may request additional information within 30-days of receiving the notice. ¹¹⁷

Public Access to Notification. Information provided is exempt from the public records act unless production is ordered by a superior court for good cause shown. ¹¹⁸

Conclusion

In the near-term, it is anticipated that more states will adopt pre-merger filing requirements. Although the FTC and DOJ have proposed changes to the HSR filing process and the contents of HSR filings, the filing threshold is set by statute, and Congress has not amended it. Therefore, healthcare transactions below the HSR filing threshold of \$111.4 million (adjusted annually) will continue not to require pre-merger notification at the federal level. States will likely seek to fill the regulatory gap. Parties considering healthcare transactions in the above states should consult with antitrust counsel early, regardless of transaction size, as falling below the HSR filing threshold does not

automatically eliminate the need for a pre-merger filing or an antitrust challenge.

Endnotes



1. Note that FTC, DOJ and state Attorneys General have the authority to investigate and challenge a transaction even if the transaction does not require an HSR filing and even after closing.
2. The goal of this article is to provide a general, high-level overview of each state's notification statute, but it does not attempt to capture all of the nuances or definitions within each statute, of which there are many. Experienced antitrust counsel should be consulted to determine whether any particular transaction requires notification in any of these states.
3. Cal. Office of Health Care Affordability, Proposed Text of CMIR Regulations (Nov. 23, 2023), 22 CCR 97431 *et seq.* (Chap. 11.5) ("OHCA Proposed Rules"), <https://hcai.ca.gov/wp-content/uploads/2023/11/CMIR-Regulation-Text-Posting.pdf>.
4. OHCA Proposed Rules, § 97431(g).
5. *Id.* at § 97435(c).
6. *Id.* at § 97435(b).
7. *Id.* at § 97439(a)-(c).
8. *Id.* at § 97435(a).
9. *Id.* at § 97441(b).
10. *Id.* at §97441(e).
11. *Id.* at § 97440.
12. *Id.* at § 97439(d).
13. *Id.* § 97431(j).
14. See Ill. Pub. Act 103-0526 § 99 (to be codified as 740 Ill. Comp. Stat. 10/7.2a), <https://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=103-0526>.
15. *Id.* at § 7.2a(b).

16. *Id.* at § 7.2a(a).
17. *Id.*
18. *Id.* § 7.2a(b).
19. *Id.*
20. *Id.* § 7.2a(c).
21. *Id.* at §7.2a(c)(1).
22. *Id.* § 7.2a(b).
23. *Id.* § 7.2a(d).
24. *Id.*
25. *Id.* §7.2(3).
26. See Colo. Rev. Stat. §§ 6-19-101 *et seq.*
27. *Id.* at 6-19-102.
28. *Id.* at 6-19-202.
29. *Id.* at 6-19-402 and 403.
30. *Id.* at 6-19-103(1).
31. *Id.* at 6-19-402(2).
32. *Id.* at 6-19-404(4).
33. Conn. Gen. Stat. § 19a-486i,
https://www.cga.ct.gov/current/pub/chap_368v.htm#sec_19a-486i.
34. *Id.* at § 19a-486i(c).
35. *Id.* § 19a-486i(b).
36. *Id.* § 19a-486i(d)(1).
37. *Id.* § 19a-486i(a)(11)
38. *Id.* § 19a-486i(b).

39. *Id.* § 19a-486i(c).
40. *Id.* § 19a-486i(b).
41. *Id.* § 19a-486i(f); *See also*, <https://portal.ct.gov/AG/General/Notice-of-Physician-Acquisition>
42. Haw. Rev. Stat. Ann. §§ 323D-71 et seq.,
https://www.capitol.hawaii.gov/hrscurrent/Vol06_Ch0321-0344/HRS0323D/HRS_0323D-0071.htm.
43. *Id.* at §323D-71.
44. *Id.* at §323D-72(b).
45. *Id.*
46. *Id.* at §323D-72.
47. *See* Mass. Gen. Laws ch. 6D § 13,
<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleII/Chapter6D/Section13>,
and the implementing regulation 958 CMR 7.00,
<https://www.mass.gov/doc/consolidated-regulations-circ-0/download>.
48. *Id.* at § 1.
49. *Id.* at § 13.
50. 958 CMR 7.00.
51. *Id.*
52. *Id.* at § 13(c).
53. *See* Minn. Stat. Ann. § 145D.01-.02,
<https://www.revisor.mn.gov/laws/2023/0/Session+Law/Chapter/66/>.
54. *Id.* at § 145D.01 subdiv. 1(e).
55. *Id.* § 145D.01 subdiv. 1(j).
56. *Id.* § 145D.02 (a)(1).
57. *Id.* § 145D.02 (b).
58. *Id.* § 145D.01 subdiv. 2(d)(3).

59. *Id.* § 145D.01 subdiv. 2(e).
60. *Id.* § 145D.01 subdiv. 2(g).
61. *Id.* § 145D.01 subdiv. 2(h).
62. *Id.* § 145D.01 subdiv. 2(f).
63. *Id.* § 145D.01 subdiv. 2(d)(9)
64. Nev. Rev. Stat. §§ 598A
65. *Id.* §§ 598A.320(1).
66. *Id.* § 598A.350 (citing Nev. Rev. Stat. § 695G.024).
67. *Id.* §598A.370.
68. *Id.*
69. *Id.* § 598A.370(2).
70. *Id.* at § 598A.370(1)(b)
71. *Id.* § 598A.390(1).
72. *Id.* § 598A.400.
73. *Id.* § 598A.400(1).
74. *Id.* §§ 598A.390.
75. *Id.* § 598A.420.
76. NY Pub. Health L. § 4550
77. *Id.* § 4550(2).
78. *Id.*
79. *Id.* at § 4550(4)
80. *Id.* § 4550(4)(b).
81. *Id.*
82. *Id.* § 4552(1).

83. *Id.* § 4552(2)(b).
84. *Id.* at § 4552(1)
85. Or. Rev. Stat. § 415.500
86. *Id.* § 415.500 (4)(a).
87. *Id.* § 415.500 (4)(b).
88. *Id.* § 415.500 (6)(a).
89. *Id.* §§ 415.500 (8)-(9).
90. *Id.* § 415.500(6)(B)
91. Oregon Health Authority, Health Care Market Oversight (HCMO) Program Notice of Material Change Transaction, <https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/HCMO-Form-Notice-of-Material-Change-Transaction.pdf> (Last accessed Dec. 13. 2023).
92. *Id.* § 415.501(4).
93. *Id.* § 415.501(7)(a).
94. *Id.* § 415.501(22)-(23)
95. *Id.* at § 415.501(15)
96. *Id.* § 415.501 (13)(c).
97. R.I. Gen. Laws §§ 23-17.14
98. *Id.* §§ 23-17.14-4 (6), 23-17.14-5(a).
99. *Id.* § 23-17.14-6 (a); 14-7(c).
100. *Id.* § 23-17.14-7 (b)(1).
101. *Id.* § 23-17.14-7 (b)(3).
102. *Id.* § 23-17.14-7 (b)(4).
103. 18 Vt. Stat. Ann. §§ 9405c

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Wash. Rev. Code § 19.390

110. *Id.* § 19.390.030

111. *Id.*

112. *Id.* § 19.390.020.

113. *Id.* § 19.390.030(3).

[1] *Id.* § 19.390.030(4).

114. *Id.* at § 19.390.040.

115. *Id.* § 19.390.060.

116. *Id.* § 19.390.030.

117. *Id.* § 19.390.050.

118. *Id.* § 19.390.070.

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