

Health Care Transactions: Hospitals, Hospital Systems, and Provider Organizations Required to Notify Washington State Attorney General

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Effective January 1, 2020, hospitals, hospital systems, and provider organizations are required to provide written notice of certain transactions to the Washington State Office of the Attorney General (“Attorney General”).

This notice requirement, which is codified at chapter 19.390 RCW, applies to hospitals licensed under chapter 70.41 RCW or chapter 71.12 RCW. It also applies to any entity affiliated with a hospital through ownership, to a parent corporation of a hospital, and to any entity affiliated with the parent corporation of a hospital through ownership or control. In addition, the requirement applies to “provider organizations”, a term defined to include an organized group of persons in the business of health care delivery or management that represents seven or more health care providers in contracting with carriers or third-party administrators for the payments of health care services. Provider organizations include physician organizations.

By passing House Bill 1607 to impose this new notice requirement, the Legislature sought to ensure that competition beneficial to consumers in health care markets across Washington remains strong. Its intent was to provide the Attorney General with notice of all material health care transactions so that the Attorney General has the information necessary to determine whether an investigation is warranted for potential anticompetitive conduct and consumer harm. This notice requirement is intended to supplement the federal Hart-Scott-Rodino Antitrust Improvements Act of 1976, which requires companies intending to engage in certain mergers or acquisitions to provide premerger notification to the United States Federal Trade Commission and the Department of Justice before consummating these transactions. The federal reporting requirement applies to proposed transactions that satisfy certain size and other criteria, and each party to a transaction that meets the criteria must file notifications and wait a specified period of time, typically 30 days, before consummating the transaction. The waiting period enables the enforcement agencies to review whether the effect of the transaction will be to lessen competition substantially.

Transaction Resulting in a “Material Change”

Under Washington state law, no less than 60 days prior to the effective date of a transaction that results in a “material change”, parties to the transaction must submit written notice to the Attorney General. A material change is defined as “a merger, acquisition, or contracting affiliation” between two or more hospitals, hospital systems, or provider organizations. A material change also includes transactions between a Washington entity and an out-of-state entity where the out-of-state entity generates 10 million dollars or more in health care services revenue from patients residing in

Washington state. The notice requirement applies to transactions with an anticipated effective date of January 1, 2020 or later.

A merger includes a consolidation of two or more organizations, including two or more organizations joining through a common parent organization or two or more organizations forming a new organization, but does not include a corporate reorganization. An acquisition includes an agreement, arrangement, or activity the consummation of which results in a person or an entity acquiring directly or indirectly the control of another person or entity, and includes the acquisition of voting securities and noncorporate interests, such as assets, capital stock, membership interests, or equity interests. Lastly, contracting affiliations are any relationships between entities for the purpose of negotiating rates with carriers or third-party administrator arrangements among entities under common ownership. Mergers, acquisitions, or contracting affiliations between hospitals, hospital systems, or provider organizations are only considered a material change if there was no common ownership prior to the transaction.

Notice of Material Changes

RCW 19.390.040 requires written notice to the Attorney General of a material change. The notice must include the following information: (1) names of the parties and their current business addresses; (2) identification of all locations where health care services are currently provided by each party; (3) a brief description of the nature and purpose of the proposed material change; and (4) the anticipated effective date of the proposed material change.

The Attorney General may make any requests for additional information from the parties within 30 days of the date notice is received, and nothing precludes the Attorney General from conducting an investigation or enforcing antitrust laws at a later date.

Notice of Filings under the Hart-Scott-Rodino Act Required

Any provider or provider organization conducting business in Washington that files a premerger notification with the Federal Trade Commission or the United States Department of Justice, in compliance with the Hart-Scott-Rodino Antitrust Improvements Act, Title 15 U.S.C. Sec. 18a, is required to provide a copy of the filing to the Attorney General. Providing a copy of the federal filing to the Attorney General satisfies the notice requirement under RCW 19.390.040.

Penalty for Noncompliance

A person who fails to comply with chapter 19.390 RCW is subject to a civil penalty of up to \$200 for each day of noncompliance. Failure to comply does not create a private cause of action.

Practical Takeaways

- If contemplating a transaction involving a hospital, hospital system, or provider organization, determine whether the transaction constitutes a material change.
- If the transaction involves a material change, ensure the Attorney General has been given written notice, if required, at least 60 days in advance and ensure the notice includes the required elements.
- Be prepared to provide additional information, if required, to the Attorney General.

For more information, please contact Emily R. Studebaker, Esq. at (425) 279-9929 or estudebaker@studebakernault.com.

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