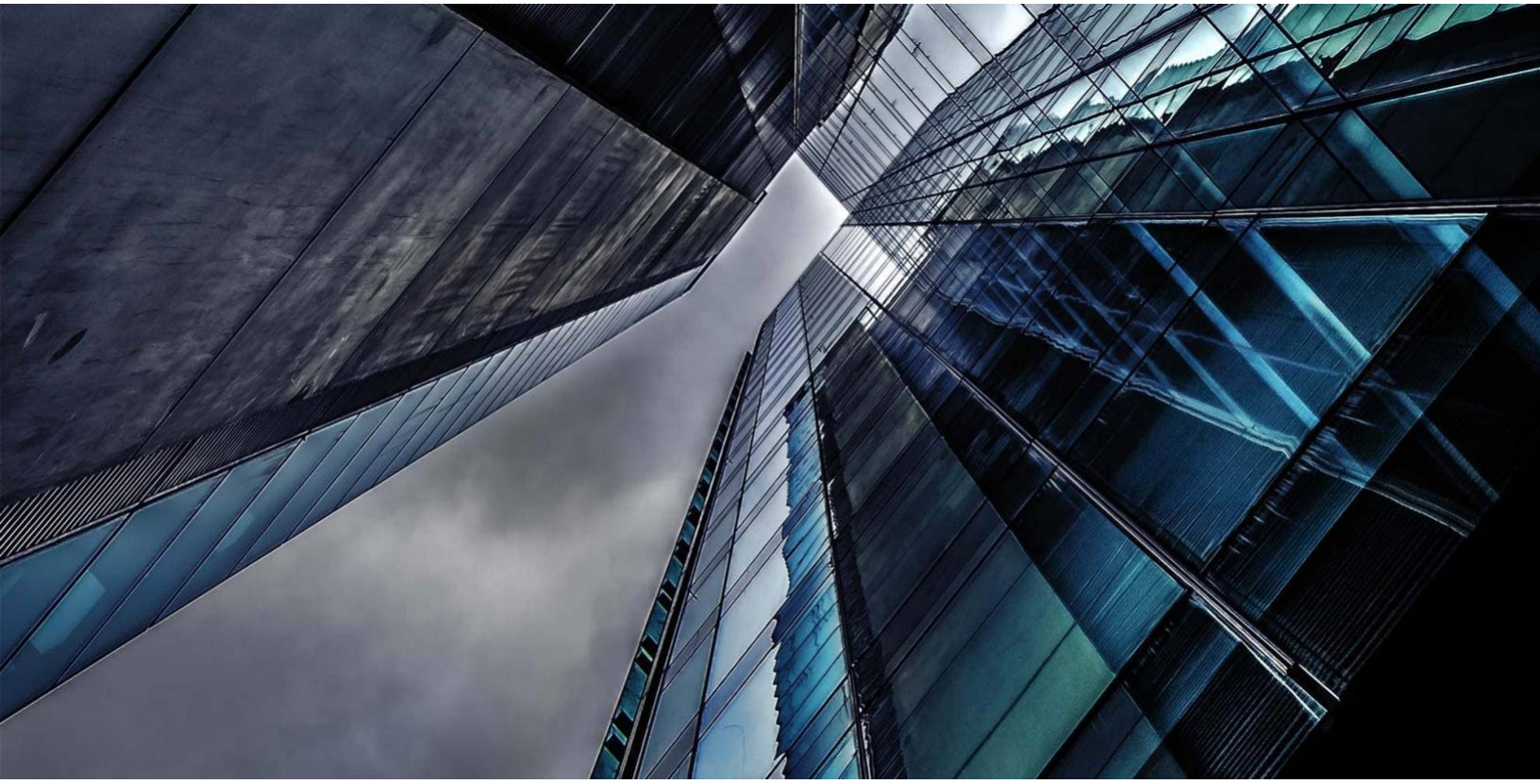
Research Report



Preventing Anticompetitive Healthcare Consolidation: Lessons from Five States

Jaime S. King, Samuel M. Chang, Alexandra D. Montague, Katherine L. Gudiksen, Amy Y. Gu, Daniel Arnold, and Thomas L. Greaney

With contributions from Richard M. Scheffler and Brent D. Fulton

June 2020

THE SOURCE
ON HEALTHCARE PRICE & COMPETITION
a project of the University of California Hastings College of Law

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ACKNOWLEDGMENTS

This report was funded by Arnold Ventures. We are grateful to them and to all our funders, who make it possible for the Source on Healthcare Price and Competition to advance its mission.

The views expressed are those of the authors and should not be attributed to the Source on Healthcare Price and Competition or the Nicholas C. Petris Center on Health Care Markets and Consumer Welfare of the UC Berkeley School of Public Health, its trustees, or its funders. Funders do not determine research findings or the insights and recommendations of the Source on Healthcare Price and Competition.

EXECUTIVE SUMMARY

American healthcare markets are more consolidated than at any point in history and this consolidation is a leading driver of healthcare price increases.[1] As a result, Americans pay more for healthcare goods and services than citizens of any other country without offsetting improvements in quality or access.[2] In previous decades, many mergers involving healthcare providers went unchallenged, but more recently, antitrust enforcers have increasingly used the statutory, regulatory, and litigation tools at their disposal to address healthcare consolidation that leads to price increases.[3]

Nonetheless, the coronavirus pandemic is placing financial strain on many physician practices and small, rural hospitals,[4] elevating the risk of unchecked consolidation to paramount importance. Specifically, state governments can play a critical role in improving oversight of anticompetitive mergers and other affiliations, especially in this time. However, states vary considerably in their resources, statutory authority, and antitrust enforcement methods, which leads to significant variability in state oversight of provider transactions.

Research of statutes, regulations, and antitrust enforcement actions in all fifty states identified five states – California, Connecticut, Massachusetts, Pennsylvania, and Rhode Island – with the most robust legal frameworks to prevent anticompetitive healthcare provider consolidation. This report describes the legislative, regulatory, and litigation activities by these five states and then identifies five practices that state policymakers should consider to enhance oversight of healthcare consolidation in their own state, including:

1. Institute pre-transaction notice of all proposed transactions coupled with waiting periods and processes requiring production of economic and financial information about the proposed transaction;
2. Implement a multi-agency healthcare transaction approval process for all healthcare transactions, including all mergers, joint ventures, and affiliations, that involve a material change in control;
3. Establish specific criteria for the healthcare transaction review, such as the impact on healthcare markets, prices, quality and access, that state attorneys general and administrative agencies should evaluate as part of the multi-agency healthcare transaction approval process;

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[1] *Diagnosis: Opaque Donald Trump Wants Hospitals to be More Upfront About Prices*, THE ECONOMIST (November 21, 2019), https://www.economist.com/business/2019/11/21/donald-trump-wants-hospitals-to-be-more-upfront-about-prices [hereinafter *Diagnosis: Opaque*]. The healthcare concentration measures for this article were provided by Brent Fulton, Daniel Arnold and Richard Scheffler at the Nicholas C. Petris Center on Health Care Markets and Consumer Welfare at the University of California, Berkeley.
[2] Gerard F. Anderson, Peter Hussey & Varduhi Petrosyan, *It's Still the Prices, Stupid: Why the US Spends So Much on Health Care, and a Tribute to Uwe Reinhardt*, 38 HEALTH AFF. 87, 88–89 (2019).
[3] Thomas L. Greaney & Barak D. Richman, *Part 1: Consolidation in Provider and Insurer Markets: Enforcement Issues and Priorities*, AM. ANTITRUST INST. 1,3 (2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI_Healthcare-WP-Part-I_6.12.18.pdf.
[4] Reed Abelson, *Doctors Without Patients: 'Our Waiting Rooms Are Like Ghost Towns'*, N.Y. TIMES (May 5, 2020), https://www.nytimes.com/2020/05/05/health/coronavirus-primary-care-doctor.html; Annalisa Merelli, *Coronavirus is Killing Rural Hospitals. But They Were Already Terminally Ill*, QUARTZ (May 2, 2020), https://qz.com/1845369/coronavirus-forces-already-struggling-rural-hospitals-to-close/.

4. Enable state attorneys general and state agencies, as part of the approval process, to condition approvals on specified terms and negotiate consent decrees to mitigate potential harms to markets and the public from the transaction;
5. Implement active post-transaction monitoring of all conditioned approvals and consent decrees, as well as periodically review the market impacts of other consolidations not subject to conditional approvals.

States are well positioned to evaluate proposed consolidation transactions and take action to avoid potential harms to the public and healthcare markets. During this time of crisis, state policymakers should consider expanding the tools antitrust enforcers have to effectively review proposed and oversee consummated transactions to verify that any consolidation benefits the public and does not result in rampant price increases.

I. Introduction

Americans pay more for healthcare goods and services than citizens of any other country.[5] One of the leading drivers of healthcare price increases is the pervasive consolidation in many healthcare markets, including hospital, physician, insurance, and pharmaceutical markets.[6] While all forms of healthcare consolidation can lead to increased prices, research has repeatedly shown that a main driver of healthcare spending increases is provider price increases,[7] which we focus on in this report. Provider consolidation has occurred over several decades in a wide variety of ways, including through horizontal, vertical, and cross-market mergers and acquisitions. While much of this activity has gone unchallenged by antitrust enforcers, state governments, which experience the financial strain of ever-increasing healthcare spending first-hand, have begun analyzing the statutory, regulatory, and litigation tools at their disposal to address healthcare consolidation and its negative impacts on price, quality, and access. Based on research of statutes, regulations, and antitrust enforcement actions in all fifty states, this report analyzes five key pre- and post-transaction enforcement strategies - notice, standards for review, approval, conditional approval and consent decrees, and post-merger oversight - and their utilization by the five states with the most robust legal frameworks to prevent anticompetitive healthcare provider consolidation.

A. U.S. Healthcare Markets

American healthcare markets are more consolidated than at any point in history. As of 2018, nearly 95% percent of hospital markets were highly concentrated, followed by markets for specialist physicians (77.5%), insurers (58.1%), and primary care providers (41.2%)[8] (see *Figure 1 and Figure 2*).

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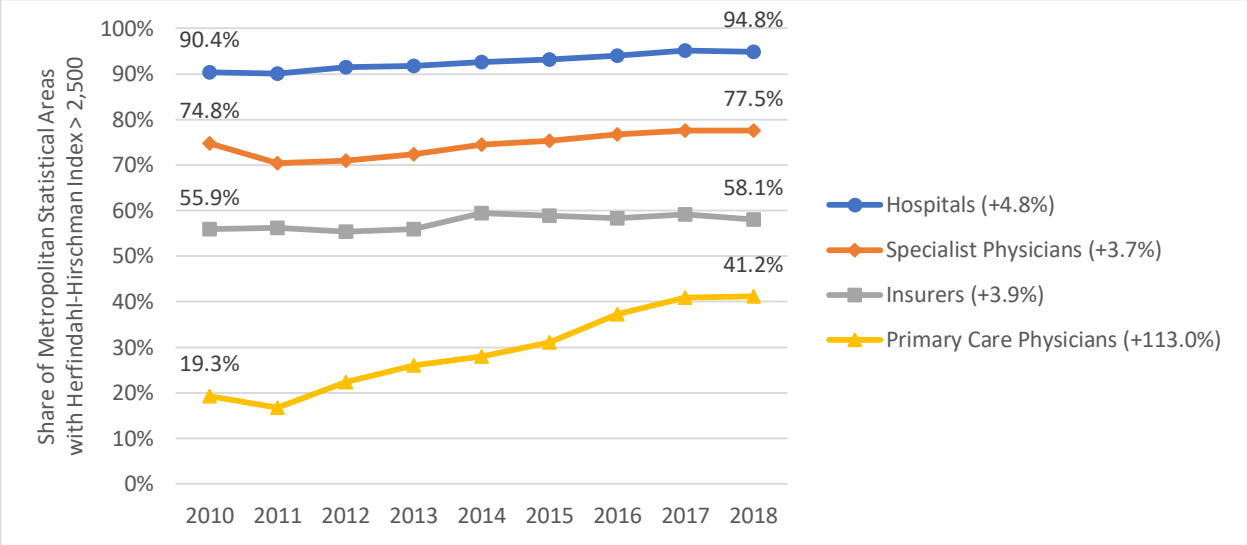
[5] Anderson, Hussey & Petrosyan, *supra* note 2, at 88–89.

[6] *See id.* at 93; Martin Gaynor et al., *Making Health Care Markets Work: Competition Policy for Health Care*, 317 JAMA 1313, 1313–14 (2017); Andrew S. Boozary et al., *The Association Between Hospital Concentration and Insurance Premiums in ACA Marketplaces*, 38 HEALTH AFF. 668, 672 (2019); Cory Capps, David Dranove & Christopher Ody, *The Effect of Hospital Acquisitions of Physician Practices on Prices and Spending*, 59 J. OF HEALTH ECONOMICS 139 (2018); Leemore S. Dafny, *Evaluating the Impact of Health Insurance Industry Consolidation: Learning from Experience*, COMMONWEALTH FUND 2 (Nov. 2015), https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_issue_brief_2015_nov_1845_dafny_impact_hlt_ins_industry_consolidation_ib.pdf.

[7] *See* CHAPIN WHITE ET AL., CTR. FOR STUDYING HEALTH SYS. CHANGE, HIGH AND VARYING PRICES FOR PRIVATELY INSURED PATIENTS UNDERSCORE HOSPITAL MARKET POWER 1 (Sept. 2013), http://www.hschange.org/CONTENT/1375/1375.pdf; Robert A. Berenson et al., *The Growing Power of Some Providers to Win Steep Payment Increases from Insurers Suggests Policy Remedies May Be Needed*, 31 HEALTH AFF. 973, 973 (2012); MARTIN GAYNOR & ROBERT TOWN, ROBERT WOOD JOHNSON FOUND., THE IMPACT OF HOSPITAL CONSOLIDATION—UPDATE (2012), http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2012/rwjf73261; Capps, Dranove & Ody, *supra* note 6; PAUL B. GINSBURG. CTR. FOR STUDYING HEALTH SYS. CHANGE, RESEARCH BRIEF NO. 16, WIDE VARIATION IN HOSPITAL AND PHYSICIAN PAYMENT RATES EVIDENCE OF PROVIDER MARKET POWER 6 (2010), http://www.hschange.org/CONTENT/1162/1162.pdf.

[8] *Diagnosis: Opaque*, *supra* note 1. The healthcare concentration measures for this article were provided by Brent Fulton, Daniel Arnold and Richard Scheffler at the Nicholas C. Petris Center on Health Care Markets and Consumer Welfare at the University of California, Berkeley. For more information, see Brent Fulton, *Health Care Market Concentration Trends in the United States, Evidence and Policy Responses*, 36 HEALTH AFF. 1530, 1534 (2017). The percentages represent the percentage of metropolitan statistical areas (MSAs) that are highly concentrated throughout the United States.

Figure 1: Healthcare Market Concentration Levels 2010-2018



Source: Nicholas C. Petris Center on Health Care Markets and Consumer Welfare (petris.org), University of California, Berkeley, analysis of data from the American Hospital Association Annual Survey, SK&A Office Based Physicians Database from IQVIA, and Managed Market Surveyor File from HealthLeaders InterStudy (Decision Resources Group).

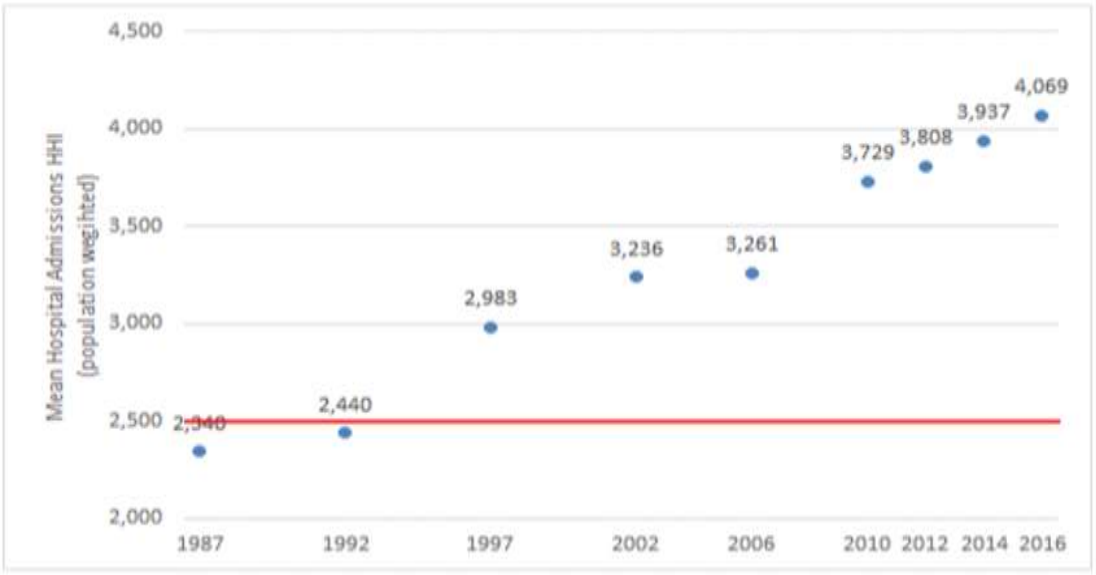
Healthcare concentration can occur in several ways. Horizontal transactions merge two similarly-situated market participants, like hospitals or laboratories. While antitrust enforcement involving horizontal hospital mergers has increased in the last decade, most vertical and cross-market healthcare transactions have occurred with little to no antitrust scrutiny.[9] Vertical transactions merge two entities at different levels of the same supply chain, such as a hospital acquiring a physician practice or a health system acquiring a laboratory. On the other hand, cross-market transactions occur when an entity in one market (e.g. a health system) merges with or acquires another related market actor (e.g. hospital or physician group) in an entirely different geographic market. For instance, Colorado-based Catholic Health Initiatives' (CHI) recent merger with San Francisco's Dignity Health in 2019 constitutes a cross-market merger of two large health systems.[10] Given the extensive consolidation occurring in healthcare markets, anticompetitive activity is also likely occurring in cross-market mergers as well. Overall in the last decade, approximately 800 healthcare transactions have occurred throughout the country.[11]

[9] Thomas L. Greaney, *The New Health Care Merger Wave: Does the "Vertical, Good" Maxim Apply?* 46 J. LAW MED ETHICS 918–926 (2019).

[10] Alex Kacik, *Catholic Health Initiatives, Dignity Health Combine to Form CommmonSpirit Health*, MODERN HEALTHCARE (February 1, 2019), https://www.modernhealthcare.com/article/20190201/NEWS/190209994/catholic-health-initiatives-dignity-health-combine-to-form-commonspirit-health.

[11] Nicholas C. Petris Center on Health Care Markets and Consumer Welfare (petris.org), University of California, Berkeley, analysis of data from the American Hospital Association Annual Survey, SK&A Office Based Physicians Database from IQVIA, and Managed Market Surveyor File from HealthLeaders InterStudy (Decision Resources Group).

***Figure 2*: Hospital Market Concentration Has Been Increasing Since At Least the Early 1990s**



Source: Nicholas C. Petris Center on Health Care Markets and Consumer Welfare (petris.org), University of California, Berkeley, analysis of data from the American Hospital Association's Annual Survey Databases, using MSA definitions from Brent Fulton, *Health Care Market Concentration Trends In The United States: Evidence And Policy Responses*, 36 HEALTH AFF. 1530 (2017) [reviewing concentration from 2010 to 2016 with MSAs < 3.72 million population in 2010] and *Hearing on Health Care Industry Consolidation: Hearing before H. Subcomm. on Health of the H. Comm. on Ways and Means*, 112th Cong. 1 (2011) (statement of Martin Gaynor) [reviewing concentration 1986 to 2006 with MSAs < 3.00 million population].

As consolidation activity continues across all healthcare markets, the implications are profound. Empirical evidence demonstrates that following horizontal mergers, hospital prices increase between 20–44%.[12] Higher hospital concentration is also associated with higher Affordable Care Act (ACA) market premiums,[13] reduced wage growth,[14] and reduced quality of care.[15] Vertical acquisitions are associated with post-transaction price increases for both the hospital[16] and physician group,[17] with little to no improvement in quality.[18] Further, hospital acquisitions of individual or small physician group practices, a practice known as stealth consolidation, have largely escaped antitrust scrutiny because individually, they are often not large enough to raise anticompetitive concerns.[19] Yet in aggregate, the overall consolidation of physician practices is alarming - the percentage of primary care physicians and specialists in practices owned by health systems nearly doubled from 2010 to 2018.[20] Finally, even cross-

[12] GAYNOR & TOWN, *supra* note 7.
[13] Boozary et al., *supra* note 6, at 671.
[14] Elena Prager & Matthew Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals* (Washington Center for Equitable Growth, Working Paper, 2019) (May 7, 2019), https://ssrn.com/abstract=3391889.
[15] Marah N. Short & Vivian Ho, *Weighing the Effects of Vertical Integration Versus Market Concentration on Hospital Quality*, MEDICAL CARE RESEARCH AND REV. 1 (2019), https://journals.sagepub.com/doi/pdf/10.1177/1077558719828938.
[16] Capps, Dranove & Ody, *supra* note 6.
[17] Laurence C. Baker, M. Kate Bundorf & Daniel P. Kessler, *Vertical Integration: Hospital Ownership of Physician Practices is Associated with Higher Prices and Spending*, 33 HEALTH AFF. 756, 762 (2014), https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2013.1279.
[18] Short & Ho, *supra* note 15.
[19] Thomas Wollmann, *Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act,* 1 AMERICAN ECONOMIC REV.: INSIGHTS 77, 77–78 (2019), https://pubs.aeaweb.org/doi/pdfplus/10.1257/aeri.20180137.
[20] Thomas L. Greaney & Richard Scheffler, *The Proposed Vertical Merger Guidelines and Health Care: Little Guidance and Dubious Economics*, HEALTH AFFF. BLOG (April 17, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200413.223050/full/.

market hospital mergers, which antitrust theory suggests has no impact on price, have been associated with post-transaction price increases of 7-10%.[21] Given the negative impact that healthcare spending continues to have on Americans' access to health care, wages, employment, and the overall U.S. economy, limiting anticompetitive consolidation and its effects are vital.

B. Overview of Federal and State Antitrust Enforcement

Current federal and state antitrust enforcement efforts have not adequately contained concentration of healthcare markets. Federal antitrust enforcement in health care is conducted jointly by the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ). Although they have joint authority, the FTC oversees healthcare provider mergers, while the DOJ oversees health insurance mergers. In the 1990s, a series of failed hospital merger challenges resulted in the cessation of hospital antitrust enforcement for nearly a decade, allowing significant consolidation activity to occur unchecked.[22] In recent years, however, the federal government has increased its enforcement activity and had some important successes challenging horizontal healthcare mergers,[23] yet it has largely ignored extensive non-horizontal consolidation happening between healthcare entities.[24] Furthermore, while both agencies receive notice of transactions reported under the federal Hart-Scott-Rodino Antitrust Improvements Act, the 2020 Hart-Scott-Rodino (HSR) filing threshold only requires reporting for transactions valued at over $94 million. As a result, many smaller transactions, such as acquisitions of physician groups by hospitals, do not meet the HSR filing threshold, allowing a significant amount of healthcare consolidation activity to occur without federal antitrust oversight.

States can work alongside or independent of federal antitrust enforcers to combat healthcare consolidation using a variety of statutory and enforcement tools. First, state attorneys general (AGs) can bring an antitrust enforcement suit under Section 7 of the federal Clayton Act, as *parens patriae* on behalf of their citizens, or via state antitrust laws that are often analogous to the federal act. State and federal antitrust laws governing consolidating transactions enable state AGs to challenge transactions that risk competitive harm through price increases, quality reductions, or harms to competitors. Second, nearly all state AGs can enforce charitable trust law, which may derive from state statutory or common law, to regulate hospital acquisitions that would change control of a nonprofit organization, including those that convert a hospital's status from nonprofit to for-profit.[25] AG reviews of healthcare transactions

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[21] Matthew S. Lewis & Kevin E. Pflum, *Hospital Systems and Bargaining Power: Evidence from Out-of-Market Acquisitions*, 48 RAND. J. ECON. 579, 603–04 (2017); Leemore Dafny, Vivian Ho & Robin S. Lee, *The Price Effects of Cross-Market Mergers: Theory and Evidence from the Hospital Industry*, 50 RAND. J. ECON. 286 (2019).

[22] Cory Capps, *From Rockford to Joplin and back again: The impact of economics on hospital merger enforcement,* 59 THE ANTITRUST BULL. 443 (2014).

[23] See, for example, the FTC's challenges of Advocate Health Care and NorthShore University HealthSystem, St. Lukes Health and Saltzer Medical Group, and Sanford Health and Mid-Dakota Clinic.

[24] Steven C. Salop, *Invigorating Vertical Merger Enforcement,* 127 YALE L. J. 1962, 1964 (2018); Greaney & Scheffler, *supra* note 20.

[25] *See* Jill R. Horowitz, *State Oversight of Hospital Conversions: Preserving Trust or Protecting Health?* (The Hauser Center for Nonprofit Organizations, Working Paper No. 10, 2002), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=334122; Phill Kline, Robert T. Stephan & Reid F. Holbrook, *Protecting Charitable Assets in Hospital Conversions: An Important Role of the Attorney General*, 13 KAN. J.L. & PUB. POL'Y 351, 390 (2003).

based on charitable trust law consider whether directors on the board have conflicts of interest, the entity is sold for fair market value, and the post-transaction entity will continue to use the charitable assets in ways that align with the mission of the initial non-profit entity. Third, states can join in lawsuits with the FTC or DOJ in other federal actions to prevent, stop, or condition healthcare mergers that substantially lessen competition or that tend to create a monopoly. Finally, states can implement strong post-merger oversight to minimize the risk that successful transactions harm competition, increase prices, or reduce access.

C. Best Practices for State Healthcare Antitrust Enforcement

Since mergers are notoriously difficult to unwind once consummated, successful healthcare antitrust enforcement demands comprehensive notice, strong premerger review and approval policies to prevent further anticompetitive concentration, as well as effective, long-term post-merger monitoring and oversight. To minimize the effects of healthcare consolidation, states can benefit from clear statutes and regulations that antitrust enforcers regularly use to identify, monitor, and prevent anticompetitive transactions.

To develop a comprehensive framework for states on how to reinvigorate antitrust enforcement for healthcare provider transactions, we analyzed pre-transaction review authority and antitrust enforcement actions in all fifty states. Because healthcare consolidation can manifest not just simply through mergers and acquisitions, this report will use the word "transactions" to encompass mergers, acquisitions, affiliations, joint negotiating agreements, joint ventures, and other exclusive contracting arrangements. Our research revealed great variation among the fifty states in the laws, regulations, and enforcement practices used to address anticompetitive healthcare provider consolidation. Some states had strong laws, but brought few enforcement actions. Others had less statutory support but managed to bring successful enforcement actions. For purposes of this report, we chose to highlight five states with comprehensive sets of antitrust enforcement tools that also demonstrated successful use of those tools. Four states—Connecticut, Massachusetts, Rhode Island, and California— passed legislation that clearly delineated the state's authority over hospital transactions by requiring sufficient notice, establishing comprehensive review criteria, and providing broad approval authority, including the right to impose conditions on the approval. Alternatively, in Pennsylvania, without legislative directives, the Attorney General established the *Review Protocol for Fundamental Change Transactions Affecting Health Care Nonprofits* to create a regulatory regime that delineates clear procedures for nonprofit hospital merger notice, review, and AG response.[26] Legislative, regulatory, and litigation activities by these five states provide valuable insights on how strong enforcement tools can provide timely and effective supervision of consolidation. This report builds upon the practices of these five states with respect to notice, review, approval, conditions and consent decrees, and post-transaction

[26] As stated in the text, in lieu of a statute, the Pennsylvania AG enacted a review protocol that is written like a pseudo-statute. This is not a recommended route, but it seems that such a protocol has assisted the AG in protecting its consumers from anticompetitive or anti-consumer transactions. *See Review Protocol for Fundamental Change Transactions Affecting Health Care Nonprofits*, OFF. OF THE ATT'Y GEN. COMMONWEALTH OF PENNSYLVANIA, https://www.attorneygeneral.gov/protect-yourself/charitable-giving/review-protocol-for-fundamental-change-transactions-affecting-health-care-nonprofits/ (last visited May 30, 2020) [hereinafter *Pennsylvania Review Protocol*].

oversight to provide recommendations for other states seeking to strengthen their healthcare pre-transaction oversight and post-transaction antitrust enforcement tools.

II. Notice

The cornerstone of any effective antitrust enforcement is timely and sufficient notice. Without notice, a state is unable to consistently and prophylactically challenge anticompetitive, anti-consumer consolidation. The five states identified in this policy brief have delineated clear pre-transaction notice requirements.

A. Recipients of Required Notice

Because hospitals and physician groups uniquely serve the community and provide critical health access, states should consider passing legislation or promulgating regulations to require mandatory pre-transaction notice that is specific to healthcare entities rather than relying on general corporation merger and acquisition notices. Effective pre-transaction notice requirements provide notice to multiple stakeholders and mandate notice for a broad set of transactions including any transaction involving a hospital or a physician group, as well as acquisitions of for-profit entities.

First, who gets notice is critically important. States AGs are an obvious choice due to their ability to file suits to enjoin transactions that may harm citizens. In addition, other state agencies can also provide assistance by analyzing the proposed transaction's impact on access, market dynamics, and prices. As seen in *Table 1*, Massachusetts, Connecticut, and Rhode Island require notice to multiple agencies.

TABLE 1: State Entities Requiring Notification of Healthcare Transactions[i]

	MA	CT	RI	CA	PA
Attorney General	✓	✓	✓	✓	✓
State Agency*	✓	✓	✓	-	-
Certificate of Need (CON)	✓**	✓	-	N/A	N/A

** Including Massachusetts Health Policy Commission, Center for Health Information and Analysis (CHIA,) and the Department of Health units involved in non-CON review of hospital transactions*

*** In Massachusetts, the certificate of need agency is referred to as Determination of Need (DoN).*

Requiring notice to multiple entities allows a state to distribute the labor required to review transactions and benefit from the expertise and resources of a variety of agencies. For example, by requiring notice to specialized state agencies like the Massachusetts Health Policy Commission and Connecticut's Health Systems Planning Unit in the Office of Health Strategy, the AG can benefit from their healthcare market impact analysis, which would have been burdensome for the AG to produce. Similarly, bifurcated notice allows the Rhode Island AG to analyze a transaction on consumer protection grounds, such as fair market value and conflict of

interest, while the Rhode Island Department of Health can evaluate the transaction's impact on access to healthcare services. Not surprisingly, states with multiple levels of notice have been able to analyze a broader variety of transactions, as seen in *Table 2*.

B. Scope of Required Notice

Second, a broad notice requirement is also critically important for state regulators to capture the complete picture of consolidation. States looking to effectively mitigate healthcare concentration should require notice of transactions that include a broad set of provider organizations, such as for profit entities (see *Table 2*), as well as a broad scope of transactions, such as transactions that involve a material change in governance or operations (see *Table 3*).

TABLE 2: Type of Entities and Transactions Requiring Notification [ii]

	MA	CT	RI	CA	PA
All Providers and Provider Orgs (Broadest)	AG, S	CON	-	-	-
All Group Practices	-	AG	-	-	-
All Hospitals	DoN	AG*	AG, S	-	-
All Nonprofit Hospital Transactions (including conversions)	-	-	-	AG	AG
Conversions Only** (Most Narrow)	AG^	AG^, S^	AG[+], S[+]	AG[+]	-

** If the hospital transaction was large enough to require notification under the federal Hart-Scott-Rodino Act.*
*** Conversions here are defined as nonprofit hospitals being sold to or acquired by a for-profit entity.*
^ Separate notice and review statute governs for this conversion-specific notice.
[+] Notice and review are encompassed in broader statute for this conversion-specific notice

All Providers and Provider Orgs = All group practices, hospitals, and other providers and provider organizations (i.e. encompasses all other categories in the table and more)
AG = Attorney General
S = State Agency (including HPC, CHIA and the Department of Health units involved in non-CON review of hospital transactions)
CON = State Certificate of Need Agency
DoN= MA Determination of Need Agency

Broad notice of all forms of healthcare consolidation, including vertical, cross-market, and stealth consolidation, is essential to mitigate anticompetitive harms in modern markets. While consolidation in the late 1990s mostly involved conversions and horizontal consolidation of nonprofit hospitals, more recent consolidation of hospitals, and particularly hospital systems, increasingly involves other service lines, such as physician practices and clinics.[27] Additionally, private equity firms and hedge funds have increasingly sought to acquire or affiliate with hospitals and physician groups, which do not always require notice.[28] States are not well

[27] Greaney & Richman, *supra* note 3.
[28] *See, e.g.,* Jacqueline LaPointe, *Private Equity Firms Increasingly Buying Physician Practices*, REVCYCLEINTELLIGENCE (Feb. 25, 2020), https://revcycleintelligence.com/news/private-equity-firms-increasingly-buying-physician-practices; Lovisa Gustafsson, Shanoor Seervai & David Blumenthal, *The Role of Private Equity in Driving Up Health Care Prices*, HARVARD BUSINESS REV. (Oct. 29, 2019), https://hbr.org/2019/10/the-role-of-private-equity-in-driving-up-health-care-prices; Samantha Liss, *Private Equity Sees Ripe Opportunity in Healthcare This Year*, HEALTHCAREDIVE (Mar. 25, 2019), https://www.healthcaredive.com/news/private-equity-sees-ripe-opportunity-in-healthcare-this-year/548831/.

equipped to challenge these less-classically anticompetitive transactions. To counter the novel forms of increasing healthcare market power that drive up prices and limit quality, state policymakers should require state regulators to be notified of all transactions that contribute to healthcare consolidation.

While California and Pennsylvania limit notice requirements to nonprofit hospital transactions, Rhode Island, Massachusetts, and Connecticut have expanded the breadth of their notice requirements, and thereby their scope of oversight, to include transactions that involve all hospitals and all providers, including physician practices. In doing so, these three states can more effectively monitor all means of consolidating healthcare markets.

In addition to expanding the types of entities required to provide notice, some states have expanded notice requirements to include transactions that extend beyond traditional forms of consolidation, such as affiliations and hiring of independent physician groups. Specifically, Massachusetts and Connecticut require notice of any transaction that would result in a "material change" to the operations or governance structure of provider organizations, including both for-profit and non-profit physician groups and hospitals. "Material change" provisions encompass a wide variety of emerging forms of consolidation that include contractual affiliations and transactions that can result in stealth consolidation.[29] To ensure all intended transactions are included, states have included specific examples, as seen in Appendix A. The most common examples include merger, affiliation, conveyance or gift, lease, consolidation, exchange, sale, and transfer. *Table 3* provides examples of language used by the five model states analyzed in this report that other state policymakers could use to cover a broad range of transactions.

TABLE 3: Type of Transactions Requiring Notification to State Regulators[iii]

	MA	CT	RI	CA	PA
Material change to its operations or governance structure of a provider or provider organization	AG, S	AG*	-	-	-
Federal Filing under Hart-Scott-Rodino Act	-	AG	-	-	-
Transfer of ownership or control, generally	DoN	CON**	AG, S	-	-
Transfer of ownership or control, nonprofit corporations	-	AG, S	AG, S	AG	AG

** As it relates to group practice only.*
*** As it relates to transfer of a healthcare facility or a large group practice (i.e. practice consisting of eight or more physicians) to any entity that is not a physician or physician group.*
AG = Attorney General
S = State Agency (including Massachusetts Health Policy Commission, CHIA and the Department of Health units involved in non-CON review of hospital transactions)
CON = State Certificate of Need Agency
DoN = MA Determination of Need Agency

To ensure the strongest notification process, state policymakers should consider requiring parties to a transaction to provide notice to multiple state entities and expanding the

[29] The state of Washington also adopted a substantially similar "material change" standard in 2019, thereby expanding the scope of transactions that must be notified to the state AG. *See* RCW 19.390.010 et seq.

scope of transactions and transacting entities that must provide notice to the state prior to consummation.

III. Review

While notice is an essential first step, it will only mitigate anticompetitive healthcare consolidation if used to allow the state ample time to review the transaction to determine its potential effects on consumers and the market. A thorough review requires a sufficient waiting period, well-articulated review criteria, the ability to compel information, and independent entities that can provide a more in-depth review if needed.

A. Mandatory Pre-Transaction Notice or Pre-Consummation Waiting Periods

States have passed legislation to create a variety of pre-transaction notice requirements and waiting periods to give state regulators sufficient time to properly assess whether the proposed transaction serves the public, preserves health access, and promotes competition (see *Table 4*).

TABLE 4: Waiting Period or Pre-Transaction Notice Timeline[iv]

	CA	CT	CT (CON)	RI	MA	PA
Waiting Period?	Yes*	Yes*	Yes	Yes	Yes^	No
Pre-Transaction Notification Timeline	-	30 days before^	-	-	60 days before^ or 90 days before*	90 days before*
Waiting Period Timeline (max)	90 days*	20 days*	231 days^^	120 days	215 days^^	-
Can Extend Waiting Period?	Yes (up to 45 days)	Yes (until deficiencies are resolved)	Yes (until AG actions resolved)	-	-	-
Cost and Market Impact Review	-	-	Yes, as specified^^	-	Yes, as specified^^	-

^ Notification for material change.
^^ See immediate paragraph below. For Connecticut's CON, the initial review period for a completed application shall be ninety days from the date on which the unit posts such notice on its Internet web site.
** Notification for transaction involving nonprofit hospital.*
CON = State Certificate of Need Agency

California, Connecticut, and Rhode Island require waiting periods as part of their review and approval processes for hospital transactions. Massachusetts and Connecticut also impose de facto waiting periods by preventing transactions from consummating without a cost and market impact review (CMIR) under certain circumstances.

Massachusetts requires a CMIR if the Health Policy Commission (HPC) finds that a transaction would result in "a significant impact on the commonwealth's ability to meet the

healthcare cost growth benchmark."[30] In Connecticut, a CMIR is required if the Certificate of Need (CON) application includes transfer of hospital ownership to another hospital or hospital system with net patient revenue above a certain threshold[31] or if the transaction involves a for-profit entity.[32] If the provider substantially complies with the state's data and information requests, Massachusetts' HPC has 185 days[33], while Connecticut's Health Systems Planning (HSP) has 201 days,[34] from the date of the notice to issue a final report of the cost and market impact review.[35] To provide the states time to conduct their analysis and make a decision, an entity cannot undergo a material change in Massachusetts or transfer of ownership in Connecticut until 30 days after a final CMIR report is complete.

In sum, state policymakers can pass legislation imposing a waiting period for healthcare transactions either by requiring approval or by imposing a mandatory cost and market impact review. Alternatively, state regulators can promulgate rules to create an extended pre-transaction notice like Pennsylvania's 90-day advance notice requirement, so that state regulators may have enough time to review and challenge the transaction.

B. Substantive Review Criteria

Once states have sufficient time to conduct a review, substantive review criteria can help ensure consistent and comprehensive reviews of each transaction. Review criteria may also guide state regulators and transacting entities in identifying potentially harmful transactions and can assist courts in reviewing challenged transactions.

While states have historically established different review criteria for transactions involving non-profit hospitals and for-profit hospitals, the level of healthcare consolidation now requires a more comprehensive approach with uniform baseline review criteria for all healthcare provider transactions. Currently, only a handful of states have specific review criteria that apply to for-profit hospital transactions, yet passing legislation to create unified baseline review criteria for all healthcare transactions will level the playing field between non-profit and for-profit healthcare entities and grant the state the opportunity to have a comprehensive view of all forms of healthcare consolidation. States have been successfully using review criteria for non-profit hospital transactions for decades to allow beneficial transactions to proceed while preventing or placing conditions on potentially harmful ones. Furthermore, non-profit health

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[30] MASS. GEN. LAWS ch. 6D, § 13.

[31] Specifically, a CMIR is needed for a hospital "with net patient revenue for fiscal year 2013 in an amount greater than one billion five hundred million dollars" or a hospital system "with a net patient revenue for fiscal year 2013 in an amount greater than one billion five hundred million dollars."

[32] CONN. GEN. STAT. § 19a-639f.

[33] MASS. GEN. LAWS ch. 6D, § 13.

[34] This was calculated based on all the days provided. *See* CONN. GEN. STAT. § 19a-639f ("Not later than twenty-one days after receipt of a properly filed certificate of need application involving the transfer of ownership of a hospital filed on or after December 1, 2015, as described in subsection (a) of this section, the unit shall initiate such cost and market impact review by sending the transacting parties a written notice that shall contain a description of the basis for the cost and market impact review as well as a request for information and documents. Not later than thirty days after receipt of such notice, the transacting parties shall submit to the unit a written response. [. . .] Not later than ninety days after the unit determines that there is substantial compliance with any request for documents or information issued by the unit in accordance with this section, or a later date set by mutual agreement of the unit and the transacting parties, the unit shall make factual findings and issue a preliminary report on the cost and market impact review. [. . .] Not later than sixty days after the issuance of the preliminary report, the unit shall issue a final report of the cost and market impact review.")

[35] *See* MASS. GEN. LAWS ch. 6D, § 13. *See also* CONN. GEN. STAT. § 19a-639f.

systems have begun behaving more like for-profit entities, increasing the importance of a unified set of review criteria.[36]

Reviews of non-profit hospital acquisitions typically consider whether the merged entity will comply with charitable trust law, which requires that the charitable assets of the nonprofit organization continue to be used toward its original mission.[37] As a result, reviews of nonprofit hospital transactions often include examination of specific, nuanced charitable trust criteria that include the transaction's potential impact on access to healthcare services, the mission of the acquired hospital, and the public in general, as well as whether the sale is for fair market value and whether corporate officers have met their fiduciary duty requirements (see *Table 5* and Appendix B for more detail). State review criteria for for-profit hospital mergers are much less comprehensive, when they exist at all. Rhode Island and Connecticut, however, have developed relatively strong review criteria for for-profit hospital acquisitions.[38] As shown in *Table 5*, the states require examination of the potential impact of the transaction on healthcare markets, affordability, and accessibility. Unified baseline review criteria for healthcare transactions would include features from both non-profit and for-profit review criteria, and also require that states conduct any additional review necessary to ensure non-profit acquisitions comply with state charitable trust law.

Ideally, states would pass legislation to create unified baseline review criteria that apply to all consolidating healthcare provider transactions. These review criteria should examine whether the transaction will: 1) harm healthcare markets and competition; 2) increase prices; 3) limit access to healthcare services; 4) violate fiduciary duty requirements, especially through self-dealing or conflicts of interest; or 5) harm the public interest. States should also add additional review criteria related to charitable trust law or other state interests as needed. For instance, many states have robust review criteria for evaluating nonprofit healthcare transactions that should be maintained in addition to the unified baseline criteria for all transactions (see Appendices B and C*)*. The legislation should also specify that these criteria provide the reviewing entity appropriate administrative discretion in interpreting and applying standards and allocate the burden of demonstrating public interest or other benefits to the transacting parties. Examining these criteria will provide state officials with strong guidance on whether the transaction is likely to promote or hinder healthcare markets and the health of the public.

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[36] *See* George Bai & Gerard F. Anderson, *A More Detailed Understanding of Factors Associated with Hospital* Profitability, 35 HEALTH AFF. 889, 895 (2015); Erica Valdovinos et al., *In California, Not-for-Profit Hospitals Spent More Operating Expenses on Charity Care Than For-Profit Hospitals Spent*, 34 HEALTH AFF. 1296, 1302 (2015); AHS Hosp. Corp. v. Town of Morristown, 28 N.J. Tax 456, 536 (2015) (judge noted that "if it is true that *all* non-profit hospitals operate like the Hospital in this case, as was the testimony here, then for purposes of the property tax exemption, modern non-profit hospitals are essentially *legal fiction*").

[37] *See* Appendix B, infra; Appendix C, infra; Horowitz, *supra* note 25, at 15; Kline, *supra* note 25, at 356; UNITED STATES GOVERNMENT ACCOUNTING OFFICE, NOT-FOR-PROFIT HOSPITALS: CONVERSION ISSUES PROMPT INCREASED STATE OVERSIGHT 6 (Dec. 1997) (GAO/HEHS-98-2). *Cf.* Thomas L. Greaney & Kathleen M. Boozang, *Mission, Margin, and Trust in the Nonprofit Health Care Enterprise*, 5 YALE J. HEALTH POL'Y, L. & ETHICS 1, 40, 54 (2005) (noting that "every state applies the for-profit standard, rather than the more exacting trust standard, to nonprofit corporations" and that "charitable trust law, which assumes an identifiable settlor, beneficiaries, and trust purpose, is ill-suited to the nonprofit corporation"). Greaney and Boozang also argue that the review is "questionable whether attorneys general have the resources or expertise to engage in the detailed assessments of the business and health policy issues surrounding the appropriate deployment of charitable assets." *Id.* at 4–5.

[38] *See* CONN. GEN. STAT. § 19a-639; 23 R.I. GEN. LAWS § 23-17.14-12; 23 R.I. GEN. LAWS § 23-17-14.3; 216 R.I. CODE R. 40-10-23.8.

Table 5: Review Criteria for Transactions Involving Healthcare Provider Acquisitions [v]

	UBRC	RI	RI	CT	CA	PA	MA
Type of Transactions	All Healthcare Providers	Nonprofit Acquiree	All Hospitals	All Hosp. and Physician Groups**	Nonprofit Acquiree	Nonprofit Acquiree	Conversion
Reviewing Entity	AG/Other	AG	Dept.	CON	AG	AG	AG
Effect on Market Share or Competition (including antitrust)	✓	-	✓*	-	✓	✓	-
Effect on Healthcare Affordability, Price, Costs	✓	-	✓*	✓	-	-	-
Effect on Access, Availability, or Preservation of Healthcare Services	✓	-	✓	✓	✓	✓	-
Fiduciary Duty, generally	-	-	-	-	-	-	-
Fiduciary Duty includes self-dealing or conflicts of interest	✓	✓	-	-	✓	✓	✓
Public Interest, generally	✓	-	-	-	✓	-	✓
Public Interest, specified definition	-	✓^	-	✓^^	-	✓^^^	-

* Except when a nonprofit hospital acquires a for-profit hospital.
** Physician group transactions are reviewed for CON when a large group practice (i.e. entity with eight or more full-time equivalent physicians) to any entity other than a physician or group of two or more physicians.[39]
^ Public interest based on "public's interest in trust property given, devised, or bequeathed to the existing hospital for charitable, educational or religious purposes located or administered" in the state.[40]
^^ "Public need for the health care facility or services proposed by the applicant."[41]
^^^ Public interest based on the "transaction's effect upon the availability and accessibility of health care in the affected community."[42]
UBRC = Unified baseline review criteria, as proposed in this report
Dept. = State Department of Health or designee
CON = Certificate of Need

Alternatively, states without statutory review criteria can consider creating a sub-regulatory regime as Pennsylvania has done. The Pennsylvania AG established the *Review Protocol for Fundamental Change Transactions Affecting Health Care Nonprofits* (*Review*

[39] *See* CONN. GEN. STAT. § 19a-630; CONN. GEN. STAT. § 19a-638.
[40] 23 R.I. GEN. LAWS § 23-17.14-7; 23 R.I. GEN. LAWS § 23-17.14-10.
[41] CONN. GEN. STAT. § 19a-639.
[42] *Pennsylvania Review Protocol*, *supra* note 26.

Protocol) that delineates the criteria the state AG will use to review nonprofit healthcare transactions. For example, the *Review Protocol* establishes a public interest review to evaluate the transaction's potential impact on the availability and accessibility of health care in the affected community, including an antitrust review.[43] Such review establishes uniform standards for analysis and review of transactions involving nonprofit hospitals.

Having unified baseline review criteria as a starting point enables an AG or other reviewing agency to easily analyze the most important impacts of a particular transaction and provides guidance for entities considering a fundamental change. More importantly, these criteria coupled with approval authority significantly limit the risk of the consummation of a transaction that would harm the public interest. Furthermore, as discussed in Part V, these criteria also provide guidance on how the AG or state entity may condition approval.

C. Independent Review

Analyzing the full economic and healthcare implications of many healthcare transactions requires substantial expertise, time, and resources. States seeking such information should consider employing independent consultants or creating an independent public entity, like the Massachusetts Health Policy Commission, to systematically and thoroughly review the impact of the transaction on healthcare access, price, and competition. As seen in *Table 6*, states often require the consolidating entities to pay for such consultants.

TABLE 6: Hiring Independent Consultants during State Entity Review[vi]

	CA	MA	CT	CT	RI	RI	PA
Type of Transactions	Nonprofit Acquiree	Conversion	Conversion	Conversion	All Hospitals	All Hospitals	Nonprofit Acquiree
Hiring Entity	AG	AG	AG	Dept.	AG	Dept.	AG
Hire Independent Consultants	✓	✓	✓	✓	✓	✓	✓
Review Proposed Agreement or Transaction	✓	✓	✓	✓	✓	✓	-*
Purchasers Pay for Consultants	✓	✓	✓	✓	✓	✓	✓
Results Released to Public	✓	✓	-	-	✓	✓	-

** Pennsylvania AG can hire consultants or experts to review the information provided in the notice.*

In some states where the AG does not automatically review all proposed transactions, the legislature has established specific conditions for when the AG should call for or receive an independent review. These more comprehensive reviews, such as Connecticut's and Massachusetts's CMIRs (see *Table 7*) or California's health care impact statement (HCIS) (see *Table 8*), are typically performed only for higher impact transactions. For instance, Massachusetts will require a CMIR if the transaction may impact the state's ability to meet the

[43] *Pennsylvania Review Protocol*, *supra* note 26.

healthcare cost growth benchmark or if it will impact the competitive market.[44] Likewise, Connecticut will require a CMIR if the transaction may lessen healthcare provider diversity, consumer choice, and access to care, or if the prices charged for healthcare services or total healthcare spending may negatively impact the affordability of care.[45] California requires an HCIS for transactions involving hospitals with more than fifty acute care beds and if the transaction may result in a significant effect on the availability or accessibility of existing healthcare services.[46] In addition, the California AG may request an HCIS if more information is necessary for a complete review and evaluation of the transaction.

Once triggered, independent reviews analyze a wide range of criteria to determine whether the transaction will serve the public interest. These reviews typically require analysis of the potential effects of the transaction on healthcare markets and access to care. As seen in *Table 7* and *Table 8* below, however, independent reviews can differ in focus - CMIRs provide more analysis of market and price dynamics, while California's HCIS focuses more on the impact of the transaction on access to care, the community, and charity care services. States can draft review criteria in ways that address specific concerns that directly target challenges in the local markets.

TABLE 7: Review Criteria for Cost and Market Impact Review (CMIR)

Criteria	MA	CT
Market Share and Size	✓	✓
Relative prices compared to other healthcare providers	✓	✓
Adjusted total medical expense	✓	✓
Quality of the services	✓	✓
Cost and cost trends	✓	✓
Availability and accessibility of services post-transaction	✓	✓
Impact of the transaction on competing options for the delivery of healthcare services	✓	✓
Methods used by the transacting parties to attract patient volume and to recruit or acquire healthcare professionals or facilities	✓	✓
Role of each transacting party in serving at-risk, underserved and government payer patient populations	✓	✓
Role of each transacting party in providing low margin or negative margin services	✓	✓
Consumer complaints or other allegations that a transacting party has engaged in any unfair method of competition or any unfair or deceptive act or practice	✓	✓
Public Interest	✓	✓

Once complete, the agency conducting the review can decide whether to submit the review to the AG for evaluation or make the information public. As shown in Appendix D.2, Massachusetts' HPC and Connecticut's HSP can refer the CMIR to the AG to determine whether

[44] See Appendix D for more detail.
[45] See Appendix D for more detail.
[46] See Appendix E for more detail.

to investigate further or bring suit for unfair or anticompetitive practices if the report finds the transaction is likely to result in dominant market share, higher prices, or higher medical expenses.[47]

TABLE 8: Review Criteria for Health Care Impact Statement (HCIS)

Criteria	CA
Effect of the transaction on emergency services, reproductive health services and any other healthcare services	✓
Effect of the transaction on the level and type of charity care that the hospital has historically provided	✓
Effect of the transaction on the provision of healthcare services to Medi-Cal patients, county indigent patients, and any other class of patients	✓
Effect of the transaction on any significant community benefit program that the hospital has historically funded or operated	✓
An assessment of the effect of the agreement or transaction on staffing for patient care areas as it may affect availability of care, on the likely retention of employees as it may affect continuity of care, and on the rights of employees to provide input on health quality and staffing issues	✓
An assessment of the effectiveness of any mitigation measure proposed by the applicant to reduce any potential adverse effect on healthcare services identified in the impact statement	✓
A discussion of alternatives to the proposed agreement or transaction including closure of the hospital	✓
Recommendations for additional feasible mitigation measures that would reduce or eliminate any significant adverse effect on healthcare services identified in the impact statement	✓

Overall, independent reviews can provide AGs and other state reviewing entities with in-depth information and analysis not typically at their disposal when reviewing a proposed healthcare transaction. Requiring the parties to the transaction to pay for such review can help alleviate the financial and resource burdens on states required to conduct such reviews.

D. Compelling Information

Substantive transaction reviews, such as a CMIR or HCIS, may require access to trade secrets or other propriety information. To ensure the state has access to all information necessary to conduct a thorough review, state legislatures should grant the AG and other state entities the authority to compel information during the review process and for subsequent investigations following the review.[48] As seen in Appendix F, states have granted the AG and other reviewing agencies broad authority to seek enforcement in the courts for information requested that are related to the review. States should also consider staying the waiting period until the parties have provided all requested information. For example, Massachusetts and Connecticut pause the statutory timeframe for conducting the CMIR until the parties comply with the state's information requests. To avoid claims of trade secret misappropriation, states should also clearly delineate which information will remain confidential and which information

[47] *See* Appendix D.2 for more detail. *See,* MASS. GEN. LAWS ch. 6D, § 13. *See also* CONN. GEN. STAT. § 19a-639f.
[48] State subpoena powers are listed in Appendix F.

may be disclosed to the public as part of the transaction review process to avoid the expectation that labeling the information as confidential will preclude disclosure by state officials.[49]

In sum, a comprehensive review requires a sufficient waiting period for state entities to conduct the review, substantive review criteria that requires state entities to analyze the transaction's impacts on competition, price, and access, independent consultants to assist in the review, and the power to compel information to inform the review.

IV. Approval

In addition to a broad notice requirement and a comprehensive review, states should pass legislation granting the AG or another state agency the authority to approve, approve with conditions, or block proposed transactions prior to consummation. Approval authority strengthens states' leverage to prohibit transactions or to impose conditions on its approval to mitigate any potential anticompetitive effects. To regulate healthcare consolidation, state policymakers should consider implementing a pre-transaction approval process that integrates AG approval power with those of other state agencies.

A. Pre-Transaction Approval Authority

The strongest review and approval frameworks are built around the AG (see *Table 9*). As the main enforcer of state laws, state AGs typically have significant investigative powers that can lead to a thorough review. However, limitations in resources, staffing, and expertise can hinder the AG's ability to effectively regulate the healthcare market. A multi-agency framework, on the other hand, can provide a multi-layer review and approval system that thoroughly vets transactions prior to consummation (see *Tables 5* and *9* and Appendices B and C).[50] Such a process facilitates analysis of multiple areas of concern and impact by combining expertise and information.

As illustrated by Connecticut, Massachusetts, and Rhode Island, states can effectively divide responsibility for reviewing transactions. For example, Connecticut's CON review and Rhode Island's Department of Health (DOH) review emphasize healthcare quality, access, and costs. In Massachusetts, the HPC, which does not have approval authority, provides crucial guidance to both the AG and the Determination of Need (DoN) program by producing a CMIR that includes an in-depth analysis of the proposed transaction's potential impact on healthcare spending and growth.[51] This process frees up the AG's limited staffing to analyze legal issues, including antitrust and charitable trust concerns, and allows the state agencies to focus on the implications for the public and their health. To further streamline analysis, states should focus

[49] For a detailed review of the inappropriate use of trade secrets protections to prevent disclosure of healthcare prices, see, Katherine L. Gudiksen, Samuel M. Chang & Jaime S. King, *The Secret of Health Care Prices: Why Transparency Is in the Public Interest*, CALIFORNIA HEALTH CARE FOUND. 6–11 (July 2019), https://www.chcf.org/wp-content/uploads/2019/06/SecretHealthCarePrices.pdf.

[50] For example, in Rhode Island and Connecticut, respectively, the Department of Health or the Office of Health Strategy work concurrently with the AG to review and approve proposed transactions. 23 R.I. GEN. LAWS § 23-17.14-11; CONN. GEN. STAT. § 19a-486a.

[51] MASS. GEN. LAWS ch. 6D § 13.

on identifying and analyzing "high impact" transactions. One mechanism for doing so is to establish a tiered framework that delineates transactions that will have de minis impact, moderate impact, or high impact, which will help state regulators better focus on potentially more anticompetitive transactions.[52]

TABLE 9: Pre-Transaction Approval Authority for Healthcare Transactions

	RI	CT (CON)	CA	CT	MA	PA
Pre-Transaction Approval for All Hospitals	AG, S	HSP	-	-	-*	-
Pre-Transaction Approval for All Physician Groups	-	HSP	-	-	-*	-
Pre-Transaction Approval for Transactions Involving Nonprofit Acquirees Only	-	-	AG	-	-*	-
Pre-Transaction Approval for Conversions Only	-	-	-	AG, S	-*	-
Must File Suit to Challenge Transaction	-	-	-	-	AG	AG

** = Determination of Need needed for transfer of ownership but no significant review takes place unless services or bed capacity of the facility will be changed in being acquired.*
S = State Agency (including the Department of Health units involved in non-CON review of hospital transaction such as Office of Health Strategy)
HSP = Health System Planning Unit, which is Connecticut's Certificate of Need Agency

Pre-transaction approval authority paired with independent consultants and strong investigative powers (as described in Part III) can help provide the AG and other state actors with the necessary information to limit future anticompetitive consolidation. However, like the notice requirement, effective pre-transaction approval requirements must have a broad reach and include any transaction involving any hospital (for-profit and non-profit) or physician group.

B. Parens Patriae Authority

Alternatively, in the absence of pre-transaction approval authority, state AGs have invoked their *parens patriae* authority to challenge cases in court. For example, Massachusetts' and Connecticut's Antitrust Acts[53] empower the AGs to challenge transactions that are anticompetitive or against the public interest. Specifically, the Massachusetts AG can file a civil action under the Massachusetts Antitrust Act as *parens patriae* if the transaction will harm the public interest by restraining trade, resulting in a monopoly, or by discouraging competition.[54] Similarly, in Pennsylvania, the AG can challenge a transaction by filing a civil action as *parens*

[52] For recommendations on how to develop such a tiered review framework, see, Samuel M. Chang, Katherine L. Gudiksen, Thomas L. Greaney & Jaime S. King, *Examining the Authority of California's Attorney General in Health Care Mergers*, CALIFORNIA HEALTH CARE FOUND. (Apr. 2020), https://www.chcf.org/wp-content/uploads/2020/04/ExaminingAuthorityCAAttorneyGeneralHealthCareMergers.pdf.
[53] MASS. GEN. LAWS ch. 93, § 9; CONN. GEN. STAT. § 35-32.
[54] MASS GEN. LAWS ch. 93 § 9. Per MASS. GEN. LAWS ch. 93A § 5, the Massachusetts AG can also file an "Assurance of Discontinuance" with the court if he or she and the transacting parties reach an agreement for approving the transaction with specific conditions attached to address any concerns the AG may have about the transaction in the future.

patriae if the transaction will potentially harm the public interest. The Massachusetts, Connecticut, and Pennsylvania AGs have all challenged proposed transactions through a variety of legal theories, including Section 7 of the Clayton Act, Section 2 of the Sherman Act, and state common law.

No matter the approach, any form of prior review and approval greatly increases the likelihood that the state will identify and block potentially harmful transactions or impose conditions that prevent such harms from occurring. For approved transactions, reviewing agencies must have the ability to impose conditions on the transactions to prevent anticompetitive, anti-consumer practices from occurring post-transaction.

V. Conditions and Consent Decrees

While the goal of antitrust enforcement is to prevent anticompetitive transactions before they occur, in limited circumstances, weighing potential competitive harms from a consolidation against other salient policy considerations may lead a state to conclude that imposing specific conditions on future conduct best serves the public interest. It is important, however, that such conditional approvals be carefully designed to minimize harms and achieve desired benefits and that their effects be closely monitored. Further, the opportunity for conditional approval should apply to both for-profit and nonprofit provider transactions to establish comprehensive oversight over all forms of healthcare consolidation.

States can impose conditions on transactions in two ways. First, any state agency with prior approval powers can approve the transaction subject to certain conditions. Second, state AGs without prior approval authority, like the Massachusetts and Pennsylvania AGs, can seek court approval to impose negotiated conditions through consent decrees. Regardless of the method, the statutory review criteria applied by a state agency or the law under which an AG brings suit will greatly inform the types of conditions imposed. State policymakers should keep this in mind when composing review criteria for state agencies or when relying on the AGs' ability to challenge transactions in the courts through their power as *parens patriae*.

A. Conditional Approval

Passing legislation to give state agencies the authority to impose conditions through their prior review and approval processes provides them the flexibility and creativity to address concerns pertinent to their local communities. As Appendices B and C illustrate, the review criteria under which state agencies conduct prior review and approve a transaction, and the imposed conditions that result from the review, vary across a range of issues from competition and pricing to nonprofit and trust law concerns. For example, in Connecticut's CON decision letters conditionally approving a transaction, the HSP systematically covers each criterion and explains why the terms of the transaction do or do not meet the criteria. If the terms do not meet certain criteria, then the agency imposes conditions to address that deficiency.

Clear review criteria inject transparency into the approval process for reviewing agencies and transacting parties. In addition, they can provide justification for the resulting

conditions when states allow transactions that could potentially result in anticompetitive behavior. For example, in Hartford Healthcare's 2019 acquisition of St. Vincent's Medical Center, HSP expressed concern that the entities had not provided sufficient evidence to show that their proposal would not negatively affect the quality of health care, adversely affect healthcare costs to consumers, or result in a duplication of services.[55] As a result, HSP imposed conditions on the transaction that required: 1) compliance with a cost growth cap; 2) increased participation in alternative payment models that require accountability for quality and cost of care; 3) accountability for excessive annual price increases for certain services; 4) notice of any significant change to the charity care policy that could adversely affect consumer costs or access; 5) a Community Health Needs Assessment with implementation strategies; and 6) various requirements to promote community-building.[56] The HSP review and approval process clearly addressed the potential concerns arising from the transaction and the rationale for its decision.

Given the importance of review criteria, multi-agency review allows different state entities to evaluate review criteria in accordance with their expertise. Multi-agency review also allows states to implement a wider range of conditions to address the potential adverse effects of the transaction. Rhode Island requires approval by both the AG and the DOH, which can result in two sets of imposed conditions. For example, in Prime Healthcare Services' acquisition of the bankrupt Landmark Medical Center in 2016, the AG imposed conditions that focused on maintaining the nonprofit mission of the hospital.[57] In contrast, DOH's conditions reflected its access-focused review criteria by requiring the adoption of programs to improve health outcomes and the continued operation of all of Landmark's existing services for at least five years.[58] By having two or more separate agencies review and approve the transaction, the conditions imposed can help ameliorate concerns raised by the transaction on several fronts. States should consider a multi-agency review framework, like Rhode Island's, that divides agency focus and expertise and enables various agencies to impose conditions on specific areas of concern.

Lastly, because state agencies do not have to receive court approval on conditional approvals of transactions, states should statutorily determine the judicial standards of review for challenges to conditional approvals. One benefit of conditional approvals is that they save state agencies time and resources by not requiring them to go through a court to impose conditions on a transaction. To maintain that benefit, states should impose a standard of review that provides deference to the attorney general's or state agency's decision to prevent the transacting entities from circumventing the approval process without clear agency error.

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[55] *Settlement Agreement: Transfer of ownership of St. Vincent's Medical Center to SVMC Holdings Inc*., CONNECTICUT OFF. OF HEALTH STRATEGY 5, 7–8 (2019), https://portal.ct.gov/-/media/OHS/CONfolder/1832271-HHC-St-Vincents-Final--executed.pdf?la=en.

[56] *Id*. at 10–15.

[57] These conditions included that Prime must: 1) transfer certain charitable assets to the Rhode Island Foundation or a similar entity for disbursement; 2) provide information about any actions taken against Prime or any final resolution to the investigation currently being conducted by the DOJ and Office of Inspector General regarding coding at Prime's hospitals; and 3) inform the AG of any actions taken against it or any of its hospitals or affiliates by any governmental entities. *Decision In Re: Initial Application of Prime Healthcare Services-Landmark, LLC*, RHODE ISLAND DEPT. OF THE ATT'Y GEN. (Oct. 28, 2013), http://www.riag.ri.gov/documents/PrimeLandmarkFinalDecision.pdf.

[58] *Decision In Re: Initial Application of Prime Healthcare Services-Landmark, LLC*, RHODE ISLAND DEPT. OF HEALTH (Feb. 17, 2014), https://docs.google.com/file/d/0B9lx-sHDAL9qczBHTlNRTlBwN2M/edit.

Conditional approval permits states to approve transactions that may benefit the community while implementing restrictions to prevent any potential harmful side effects of the transaction. While competition concerns should be addressed by at least one agency, state policymakers should also be sure to include factors such as continued access to healthcare services and the protection of charitable assets. Review criteria can provide a starting point for state agencies in their approval processes and help identify potential categories of conditions for use in conditional approval. However, state agencies should retain enough flexibility to reflect the needs of the community in the conditions imposed on a transaction.

B. Consent Decrees

State AGs without statutory prior approval authority, like those in Pennsylvania and Massachusetts, can still negotiate conditions on a transaction in exchange for not blocking the transaction in court. However, unlike the conditional approvals discussed in Part V-A above, conditions implemented through consent decrees must receive court approval.[59] As with conditional approval, the law used to challenge the transaction will play a key role in defining the parameters of conditions imposed via a consent decree.

In Massachusetts, the AG challenged several healthcare mergers under state antitrust or unfair trade practices law as *parens patriae*. In reaching consent decrees with the transacting entities, the AG often relied heavily on the CMIRs provided by the HPC, which include the impact of the transaction on market competition and the state's ability to meet the healthcare cost growth benchmark.[60] HPC's CMIR on the Beth Israel Deaconess Medical Center and Lahey Health merger warned that the merged entity would gain greater market power and leverage in negotiating with insurers and allow it to increase prices.[61] After reviewing the HPC's report and conducting her investigation, Massachusetts AG Maura Healey negotiated with representatives from the merging entities and agreed to a set of conditions on which she would allow the merger to proceed. Healey then filed the negotiated consent decree with the Superior Court claiming the transaction violated Massachusetts' Unfair Trade Practices Act, but would be permissible with conditions. The consent decree imposed conditions designed to mitigate potential harms to competition and the public, including a seven-year price cap to ensure the merged entity's price increases remain below the state's annual healthcare cost growth benchmark of 3.1%, a contribution of $70 million in community investments for low-income populations, and a requirement to strengthen the commitment to MassHealth, among others.[62]

However, courts may not approve a consent decree if the conditions do not adequately address the potential impacts of the transaction. In 2015, a Massachusetts court rejected the

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[59] *See* MASS GEN. LAWS ch. 93 § 9; 73 PA. STAT. § 201-4.

[60] MASS. GEN. LAWS ch. 6D § 13. *See also* Appendix D.

[61] MASSACHUSETTS HEALTH POLICY COMM'N, THE PROPOSED MERGER OF LAHEY HEALTH SYSTEM; CAREGROUP AND ITS COMPONENT PARTS, BETH ISRAEL DEACONESS MEDICAL CENTER, NEW ENGLAND BAPTIST HOSPITAL, AND MOUNT AUBURN HOSPITAL; SEACOAST REGIONAL HEALTH SYSTEMS; AND EACH OF THEIR CORPORATE SUBSIDIARIES INTO BETH ISRAEL LAHEY HEALTH 103 (2018), https://www.mass.gov/files/documents/2018/09/27/Final%20CMIR%20Report%20-%20Beth%20Israel%20Lahey%20Health.pdf.

[62] Assurance of Discontinuance, Commonwealth of Massachusetts v. Beth Israel Lahey Health, Inc. (No. 2018-3703, November 29, 2018), https://www.mass.gov/files/documents/2018/11/29/BILH%20AOD%20Filed%202018.11.29.pdf

conditions imposed by the AG on Partners Healthcare's acquisition of three hospitals.[63] Those conditions also included price caps as well as limitations on Partners Healthcare's ability to contract with payers on behalf of affiliated providers, and the preservation of certain services.[64] The court found that the consent decree ultimately did not do enough to restore competition that would be lost through the acquisitions.[65] The court also expressed serious concern about the enforceability of the consent decree, because it relied on judicial involvement to resolve disagreements between the parties in ten different areas for a period of ten years.[66]

Like Massachusetts, the Pennsylvania AG also has exercised its authority as *parens patriae*, to review and challenge transactions in court under federal or state law.[67] Despite its lack of statutory scheme compared to the other states, Pennsylvania's AG has actively challenged many mergers of healthcare entities under both federal and state antitrust law. The Pennsylvania AG reached multiple consent agreements with the transacting entities to address potential harms to competition. For example, when Geisinger Health System proposed to acquire Bloomsburg Hospital, the AG sought to enjoin the transaction under Section 7 of the Clayton Act as well as the state common law doctrine against the suppression of competition, but ultimately negotiated a consent decree that was later approved by the district court.[68] The conditions imposed on this transaction required Bloomsburg Hospital to remain a general acute care hospital for eight years and prohibited the use of most-favored nation clauses in its contracts.[69] These conditions sought to address the anticompetitive concerns made in allegations under both federal and state laws.

In all five of the states discussed in this report, the laws governing the state agency's review and subsequent power to conditionally approve or challenge a transaction establishes the parameters for which the state agency can impose conditions. It is crucial for a state to have clear and relevant criteria to help guide strong and effective conditions afterward. While states can effectively use transaction review and approval authority to respond to the needs of localized communities, states must also be mindful that specific review criteria should serve as guidance and not a strict list. State agencies should instead carefully tailor conditions to the specifics of the local market to minimize harms and achieve the desired benefits, as well as monitor their effects on healthcare consumers and markets. The ability to impose conditions is a crucial tool for state agencies to monitor and address the potential anticompetitive effects of approved transactions.

VI. Post-Transaction Oversight

[63] *See* Memorandum of Decision and Order on Joint Motion for Entry of Amended Final Judgment by Consent at 27, Commonwealth v. Partners Healthcare Sys., Inc., No. SUCV2014- 02033-BLS2 (Mass. Super. Ct. Jan. 29, 2015), http://www.mass.gov/ago/docs/press/2015/partners-memo-of-decision-and-order.pdf [hereinafter Partners Memo of Decision and Order].
[64] Memorandum of the Commonwealth of Mass. in Support of Entry of Final Judgment, Commonwealth v. Partners Healthcare Sys., Inc., No. SUCV2014-2033BLS (Mass. Super. Ct. June 24, 2014), http://www.mass.gov/ago/docs/press/2014/memo-in-support.pdf.
[65] Partners Memo of Decision and Order, *supra* note 65.
[66] *Id*.
[67] *Pennsylvania Review Protocol*, supra note 26.
[68] *See* Final Order, Commonwealth of Pennsylvania v. Geisinger Health System Foundation, Bloomsburg Health System and Bloomsburg Hospital (No. 4:12-cv-01081, June 27, 2012) [hereinafter Bloomsburg Final Order].
[69] *Id.* at 3, 5.

Once achieved, conditional approval or consent decree between the state and the transacting entities is only as effective as its oversight and enforcement. Having sufficient resources to monitor consent decrees for multiple transactions for extended periods presents a challenge for many states. The five states highlighted in this report use various post-transaction oversight tools including: 1) requiring the transacting entity to hire and pay for an independent monitor for a specified period (see Appendix G);[70] 2) providing compliance reports at regular intervals;[71] 3) notifying the AG of any future changes to the agreed-upon transaction or any new acquisitions by the transacting entities;[72] and 4) reimbursing the AG for the costs of its investigation.[73] We discuss the use of independent monitors and compliance reports in more detail below.

A. Independent Monitors

Connecticut, California, and Massachusetts utilize independent monitors paid for by the transacting entities to monitor compliance with the terms and conditions of the transaction for several years. Connecticut statutorily requires an independent monitor for transactions conditionally approved through its CON program, while California and Massachusetts statutorily permit the AG to hire an independent monitor in conversions of nonprofits.[74] Massachusetts has also used independent monitors through consent decrees.

For example, in the merger of Beth Israel Deaconess Medical Center and Lahey Health, the AG required the appointment of an independent monitor to issue annual compliance reports for ten years at the expense of Beth Israel Lahey Health.[75] The use of independent monitors paid for by the transacting entities enables AG offices and state agencies with limited resources to monitor completed transactions adequately.

For the best results and complete monitoring, states should follow California's example in requiring that monitors be paid for the span of the agreement and two years after the agreement expires, which allows monitors to oversee compliance during the last year of the agreement.[76]

B. Compliance Reports

In a slightly different approach, Rhode Island does not require an independent monitor but instead requires the transacting entity to file reports with the DOH and the AG's office each year, detailing compliance with the conditions.[77] The DOH and the AG must annually review the impact of the transaction on healthcare costs and services within the communities served. The

[70] *See e.g.*, CONN. GEN. STAT. § 19a-639; Assurance of Discontinuance, *supra* note 62.
[71] *See e.g.*, 23 R.I. GEN. LAWS § 23-17.14-28; Unopposed Motion to Approve and Enter Final Order at 17, Commonwealth of Pennsylvania v. Urology of Central Pennsylvania, Inc., et al. (No. 1:11-cv-01625-JEJ, August 31, 2011) [hereinafter UCPA Unopposed Motion to Approve and Enter Final Order].
[72] *See e.g.*, UCPA Unopposed Motion to Approve and Enter Final Order, *supra* note 71, at 17.
[73] *See e.g.*, CONN. GEN. STAT. § 19a-486c; 23 R.I. GEN. LAWS § 23-17.14-28; Bloomsburg Final Order, *supra* note 68, at 7.
[74] CONN. GEN. STAT. § 19a-639(e); CAL. CORP. CODE §§ 5919, 5924; CAL. CODE REGS. tit. 11, § 999.5; MASS. GEN. LAWS ch. 180, § 8A.
[75] Assurance of Discontinuance, *supra* note 62.
[76] CAL. CORP. CODE §§ 5919, 5924.
[77] 23 R.I. GEN. LAWS § 23-17.14-28.

transacting entity must pay for the costs of both the DOH and the AG in performing the monitoring and evaluations.[78] This approach allows the AG and the DOH to monitor the impacts of the transaction directly and keep close watch on any particular areas of concern.[79] The funds from the transacting parties help alleviate the strain on resources, including personnel time. Lastly, Pennsylvania's *Review Protocol* states that the AG will maintain oversight of the transaction after its consummation to ensure compliance. In addition, the AG "may mandate that the resulting entity or surviving charity report on some basis to the AG to ensure that the terms of the transaction are fulfilled."[80] Through consent decrees, Pennsylvania has imposed reporting requirements, such as requiring an entity to provide annual compliance reports and reimbursement for the costs of the AG's initial investigation.[81] Although the reporting requirement assists the AG in monitoring compliance with the imposed conditions, the AG's office still bears the brunt of monitoring the effects of the transaction for an extended period of time.

As seen above, the five states have a spectrum of requirements for post-transaction monitoring and enforcement. Methods that shift the compliance reporting responsibilities and costs away from the state agencies and onto the transacting parties can provide more effective and consistent monitoring. Monitoring and enforcement of conditions are so important that states should consider statutorily requiring post-transaction monitoring paid for by the entities within all conditional approvals. In states without conditional approval, AGs should implement similar post-transaction conditions through consent decrees.

With an effective post-transaction monitoring and enforcement plan, state agencies can identify noncompliance before it severely harms or impacts the populations the conditions aim to protect.

VII. Recommendations for Policymakers

Controlling anticompetitive healthcare consolidation is critical to controlling healthcare costs. As seen in this report, states seeking to effectively control anticompetitive healthcare consolidation must have strategies that are prophylactic, not reactive. Furthermore, effective strategies require a strong combination of statutory guidance and effective enforcement. We conclude with a set of "best legal practices," drawn from the approaches of the five states examined for this report. This analysis is the first part of a larger research project that will analyze the impact of these legal tools on healthcare markets.[82] While necessarily subject to

[78] 23 R.I. GEN. LAWS § 23-17.14-28. The exact amount is determined by the AG or the director of the DOH and is placed in escrow during the monitoring period.

[79] In the instance of noncompliance and after a hearing with the transacting party, the director of the Department of Health or the AG may deny, suspend, or revoke a license, stop the party from accepting new patients, require any corrective action to secure compliance, and impose a fine of up to $2 million. 23 R.I. GEN. LAWS § 23-17.14-30.

[80] *Pennsylvania Review Protocol*, *supra* note 26.

[81] *See*, UCPA Unopposed Motion to Approve and Enter Final Order, *supra* note 71, at 18, 20; Bloomsburg Final Order, *supra* note 68, at 7.

[82] This report is the first part of a larger project performed by health economists at the Nicholas C. Petris Center on Health Care Markets and Consumer Welfare at the University of California, Berkeley and health law and policy scholars at the University of California, Hastings College of the Law, funded by Arnold Ventures. The project will analyze the impact of these healthcare transaction review tools and practices on healthcare prices, competition, access, and quality.

tailoring for each state, the following tools can strengthen oversight of healthcare consolidation (see *Table 10*).

***TABLE 10*: Suggested Framework for Pre-Transaction Oversight for Hospitals and Physicians**

Notice	Review	Approval and Conditions	Post-Transaction Monitoring
Notice should include: *Broad Scope of Entities* x All hospital-involved transactions x All physician group-involved transactions x This should include any entities seeking a transaction with a hospital or physician group, including private equity firms. *Broad Scope of Transactions* x All forms of consolidation including mergers, acquisitions, joint ventures, management contracts, and affiliations	Statutorily explicit criteria for review of: x Antitrust and competition x Healthcare affordability and prices x Healthcare access and availability x Fiduciary duty, including self-dealing and conflicts of interest x Public interest, generally	Require pre-transaction approval	Require independent monitors for 2 years past the life of agreement, paid by purchasing entities
Multiple state entities should receive notice	Tiered level review depending on agency expertise and potential effect x Include impact review on healthcare access and markets under specific conditions	Approval decisions by state agencies should be granted enhanced deference in appeals	Require compliance reporting
Waiting Period and ability to extend waiting period	Independent consultants, paid by transacting entity, or independent public entity review	-	-
-	Subpoena power for witness testimony, document production, and answers to interrogatories	-	-

A. Pre-Transaction Notice

To ensure a thorough and timely evaluation of the potential effects of transactions, state policymakers should pass legislation or promulgate regulations to impose several procedural requirements in their notice and review procedures. For notice, transacting parties should be required to notify the state AG and any additional relevant state agencies of

proposed consolidations. Pre-transaction notice requirements must cover a broad scope of entities and transactions. In particular, state policymakers should consider employing a statutorily defined "material change" notice standard, which would require notice of all forms of consolidation including mergers, acquisitions, joint ventures, management contracts, and affiliations for all types of healthcare transactions, including those involving physician groups and hospital systems. State policymakers may also consider clarifying the scope of required notification to include acquisitions and affiliations with hedge funds and private equity firms, as California is currently doing in S.B. 977.[83]

B. Pre-Transaction Review

States should also consider implementing several procedural requirements into pre-transaction review protocols. First, to allow ample time for review, state policymakers should prohibit consummation of transactions for a specified waiting period, with a potential extension for cause or compliance with the required production of information. Second, state policymakers should also consider promulgating criteria that each agency should consider when evaluating the impact of the proposed transaction on healthcare access, prices, markets, and the public interest. In doing so, states should preserve administrative flexibility and agency discretion. Third, whenever practicable, states should obtain expert assistance either by retaining independent consultants, paid for by purchasing entities, or establishing an independent public entity to conduct a thorough analysis of impacts on markets, prices, and access. Finally, states should empower the AG and reviewing state entities to compel information necessary for review and extend the waiting period if the transacting entities do not comply with such information requests.

C. Pre-Transaction Approval

Although notice and waiting periods are necessary for effective review, they are not sufficient to control anticompetitive healthcare consolidation. Requiring pre-transaction approval gives responsibility for controlling anticompetitive healthcare consolidation to a politically accountable entity and enables the state to either prevent anticompetitive transactions before they occur or mitigate the potential harms of allowed transactions. In addition, states adopting a multi-agency approach can benefit from shared agency expertise and collaboration in determining whether transactions will serve the public interest.[84]

D. Conditional Approvals and Consent Decrees

Imposing conditions on consolidating transactions can help protect the public, but state agencies should be transparent in this decision-making process. In establishing conditions for approval or inclusion in a consent decree, state entities should apply the review criteria, but

[83] *See, e.g.,* Sen. Bill 977, 2019-2020 Reg. Sess. (Cal. 2020) (as amended May 19, 2020).

[84] As discussed above, the Massachusetts and Connecticut AGs were able to better investigate unfair trade practices or challenge anticompetitive consolidation due to the Massachusetts's Health Policy Commission's and Connecticut's Health System Planning Unit's cost and market impact review.

also retain enough flexibility to tailor conditions to the specific needs of the community. Further, state policymakers should require in statute that state regulator decisions imposing conditions on healthcare transaction approvals should receive deference on appeal, and judicial review should be limited to the established review criteria. In doing so, state regulators would avoid use of the appeal process as a workaround to the pre-transaction approval authority.

E. Post-Transaction Monitoring

Post-transaction monitoring is essential to effective consolidation management, yet it can strain finances and resources. To ease the burden of post-transaction monitoring, states should consider requiring the transacting parties to hire or pay for independent monitors. For conditioned transactions, states should also require periodic compliance reports and notification of any future changes. In addition, state policymakers should require periodic post-transaction review that retroactively assesses the impact of unchallenged or conditioned transactions to determine whether such transactions have increased prices or reduced competition. Such review can determine whether the transaction has been anticompetitive or has led to abuses of market power. If so, state AG should consider bringing suit for anticompetitive behavior. When presented with issues from the independent monitor or retroactive studies, state regulators, particularly the AGs, should have the authority to require a plan of correction that includes the risk of fines or loss of licensure or invoke a state option to temporarily manage the hospital to reduce anticompetitive behavior.

VIII. Conclusion

States should provide ample resources to protect consumers from the negative effects of healthcare consolidation, whether they be increased healthcare prices and premiums or reduced quality and access to care. In sum, these five states, California, Connecticut, Massachusetts, Rhode Island, and Pennsylvania, provide a comprehensive initial framework of regulatory tools for state policymakers seeking to reduce the harms of healthcare consolidation. These tools include a notice requirement with an appropriate waiting period, pre-transaction review and approval protocols with specific substantive review criteria, the ability to condition approval or enact consent decrees, and post-transaction monitoring of the conditions imposed. Altogether, this framework is strongest when accompanied with clear statutory guidance via regulation and proper enforcement of these statutes by state agencies and attorneys general.

We acknowledge that while the policies and practices of the five states highlighted in this report offer a composite of comprehensive healthcare antitrust enforcement strategies, this composite is not the gold standard. In addition to our suggestions above, state policymakers should also strongly consider implementing a tiered review framework that requires notice for all healthcare provider transactions, but differs on the level of review required based on the size and potential impact of the transaction. The specific details of such a

tiered review framework can be found in our prior work.[85] Furthermore, states should consider expanding their enforcement tools beyond the horizontal merger examples provided here to facilitate challenges to anticompetitive vertical and cross-market mergers.

The adverse impacts of healthcare consolidation can be felt throughout the United States – in our businesses, our economy, our healthcare premiums, our wages, and in our healthcare decision making. However, these impacts are often felt most acutely by those the system seeks to serve most – the sick and vulnerable. While the responsibility of addressing healthcare consolidation and preventing its anticompetitive impacts lies with both federal and state government entities, states have a unique and essential role to play in ensuring access to affordable health care for all who live within their borders. To do so, state governments should implement a multifaceted healthcare review framework that provides pre-transaction notice, review, and approval protocols to prevent anticompetitive healthcare transactions, as well as enable enforcers to impose conditions on consolidating entities and enforce those conditions post-merger.

[85] *See* Chang, Gudiksen, Greaney & King, *supra* note 49.

APPENDICES

Appendix A: Defining Breadth of Notice: Specific Examples of Material Changes and Other Transactions as Listed in Pennsylvania's *Review Protocol for Fundamental Change Transactions Affecting Health Care Nonprofits*[vii]

	MA	CT	PA	CA	CA (SB 977 (2020))[86]	RI
Overarching Word to Describe Scope	"Material Change"	"Material Change"	"Fundamental Change"	"Disposition"/ "Transfer"	"Acquisition"/ "Affiliation"	"Conversion"
Merger	✓[A]	✓[C]	✓			✓
Affiliation	✓[B]	✓[A,C]	✓		✓	
Conveyance or Gift			✓	✓	✓	✓
Lease			✓	✓	✓	✓
Consolidation		✓[C]	✓			✓
Exchange			✓	✓	✓	
Sale			✓	✓		✓
Transfer			✓	✓[D]	✓	
Acquisition	✓[A, B]				✓	
Acquisition of insolvent provider organizations	✓	✓[C]				
Agreement (including management/collaboration agreement)			✓		✓	
Joint Venture			✓			✓
Option				✓	✓	
Purchase					✓	✓
Acquisition or affiliation by private equity or hedge funds					✓	
Employment of all or substantially all of the physicians of a group practice		✓[C]				
Mergers or acquisitions of provider organizations which will result in a near-majority of market share in a given service or region	✓					
Association					✓	

[A] Specifically, this transaction involves a hospital or hospital system.
[B] Specifically, this transaction is between a provider or provider organization and a carrier.
[C] Specifically, this transaction must involve another group practice (that results in a group practice with eight or more physicians), hospital, hospital system, medical foundation, or entity controlled by hospital.
[D] Specifically, this includes transfer of "control, responsibility, or governance of a material amount of the assets or operations of the nonprofit corporation."

[86] Sen. Bill 977, 2019-2020 Reg. Sess. (Cal. 2020) (as amended May 19, 2020). This bill is included as it would expand California AG's oversight over healthcare transaction.

Appendix B: State Statutory Review Criteria for Hospital Conversions: For-Profit Acquirer Consolidates with Non-Profit Acquiree[viii]

	CA	PA	MA	RI	RI	CT	CT
State Entity	AG	AG	AG	AG	Dept.	AG	Dept./ HSP
Market Share, Competition, or Antitrust Law	✓	✓	-	-	✓	-	-
Effect on Healthcare Affordability, Price, Costs	-	-	-	-	✓	-	✓
Access, Availability, or Preservation of Healthcare Services	✓	-	-	-	✓	-	✓
Corporate Law: Requirement of Fiduciary Duty	✓	✓	✓	✓	-	✓	-
Improper Incentives for Patient Referral	-	-		-	✓	-	✓
Trust Law: Transaction is for Fair Market Value	✓	✓	✓	✓	-	✓	-
Trust Law: Maintain Charitable Mission or Purpose	✓	✓	-	✓	-	-	-
Other Trust Law or Principles	✓	-	-	-	-	-	-
Compliance with State Nonprofit and/or Trust Laws	-	-	✓	✓	-	✓	-
Tax-related Law	-	-	-	✓	-	-	-
Public Interest, general	✓	-	✓	-	-	-	-
Public Interest, specified definition	-	✓ (health access, antitrust)	-	✓ (purpose)	✓ (health access)	-	✓ (need for facility)
Information for Review Properly Provided	✓	✓	-	-	✓	✓	-
Workforce and Employee Rights Protections	-	-	-	-	✓	-	-
Cultural Interests Protections	✓	-	-	-	-	-	-
Certificate of Need Required	-	-	-	-	-	-	✓

Dept.= State Department of Health or designee
HSP = Health Systems Planning Unit, which is the Connecticut agency in charge of Certificate of Need (CON)

Appendix C: State Statutory Review Criteria for Review of Hospital Transactions involving Non-Profit Acquirer and Non-Profit Acquiree[ix]

	CA	PA	RI	RI	CT
State Entity	AG	AG	AG	Dept.	HSP
Market Share, Competition, or Antitrust Law	✓	✓	-	✓	-
Effect on Healthcare Affordability, Price, Costs	-	-	-	✓	✓
Access, Availability, or Preservation of Healthcare Services	✓	-	-	✓	✓
Corporate Law: Requirement of Fiduciary Duty	✓	✓	✓	-	-
Improper Incentives for Patient Referral	-	-	-	✓	-
Trust Law: Transaction is for Fair Market Value	✓	✓	✓	-	-
Trust Law: Maintain Charitable Mission or Purpose	✓	✓	✓	-	-
Other Trust Law or Principles	✓	-	-	-	-
Compliance with State Nonprofit and/or Trust Laws	-	-	✓	-	-
Tax-related Law	-	-	✓	-	-
Public Interest, general	✓	-	-	-	-
Public Interest, specified definition	-	✓ (health access, antitrust)	✓ (purpose)	✓ (health access)	✓ (need for facility)
Information for Review Properly Provided	✓	✓	-	-	-
Workforce and Employee Rights Protections	-	-	-	✓	-
Cultural Interests Protections	✓	-	-	-	-

Dept. = State Department of Health or designee
HSP = Health Systems Planning Unit, which is the Connecticut agency in charge of Certificate of Need (CON)

Appendix D: Independent Cost and Market Impact Review (CMIR) of Healthcare Transactions by Massachusetts and Connecticut[x]

Table D.1: Conditions for CMIR

Conditions for CMIR	MA	CT
Type of Transaction	Material Change	Certificate of Need
Condition to CMIR - Impact to meet the healthcare cost growth benchmark	✓	-
Condition to CMIR - Impact on the competitive market	✓	-
Condition to CMIR - Lessen healthcare provider diversity, consumer choice and access to care	-	✓
Condition to CMIR - Prices for healthcare services or total healthcare spending negatively impact the affordability of care	-	✓

Table D.2: CMIR Consultants and Referral of CMIR to State AG

CMIR Consultants and Referral of CMIR to State AG	MA	CT
Refer to Attorney General for certain findings	✓	✓
Finding of Dominant Market Share	✓	✓
Finding of Materially Higher Prices for Services than the Median	✓	✓
Finding of Materially Higher Total Medical Expense than the Median	✓	✓
AG Investigates Unfair or Deceptive Acts or Practices based on review	✓	✓
AG Investigates Unfair Methods of Competition based on review	✓	✓
Federal Harmonization Clause	✓	✓
Hire Independent Consultants	-	✓
Purchasers Pay for Consultants	-	✓
Results Released to Public	Preliminary and Final Reports Only	Preliminary and Final Reports Only

Appendix E: Health Care Impact Statement (HCIS) for Transactions Reviewed by California Attorney General[xi]

The purpose of the health care impact statement is to consider "whether the agreement or transaction may create a significant effect on the availability or accessibility of healthcare services."

Table E.1: Conditions for Health Care Impact Statement*

Affects a general acute care hospital that has more than 50 acute care beds	✓
Transaction may result in a significant effect on the availability or accessibility of existing healthcare services.	✓

**AG may seek a health care impact statement if necessary for a complete review and evaluation of the agreement or transaction.*

Table E.2: Review Criteria for Health Care Impact Statement

Effect of the transaction on emergency services, reproductive health services and any other healthcare services	✓
Effect of the transaction on the level and type of charity care that the hospital has historically provided	✓
Effect of the transaction on the provision of healthcare services to Medi-Cal patients, county indigent patients, and any other class of patients	✓
Effect of the transaction on any significant community benefit program that the hospital has historically funded or operated	✓
An assessment of the effect of the agreement or transaction on staffing for patient care areas as it may affect availability of care, on the likely retention of employees as it may affect continuity of care, and on the rights of employees to provide input on health quality and staffing issues	✓
An assessment of the effectiveness of any mitigation measure proposed by the applicant to reduce any potential adverse effect on healthcare services identified in the impact statement	✓
A discussion of alternatives to the proposed agreement or transaction including closure of the hospital	✓
Recommendations for additional feasible mitigation measures that would reduce or eliminate any significant adverse effect on healthcare services identified in the impact statement	✓

Appendix F: State Subpoena Powers

Table F.1: Subpoena Powers of Reviewing Entity for Compelling Information[xii]

	CA	CT	CT	CT	RI	RI
Type of Entity	AG	AG	Dept.	HSP	AG	Dept.
Type of Transactions	Nonprofit Acquiree	Conversion	Conversion	All Hospitals	All Hospitals	All Hospitals
Answer Interrogatories	✓	✓	✓	-	-	-
Testify Under Oath	✓	✓	✓	✓	✓	✓
Produce Documents	✓	✓	✓	✓	✓	✓
Subpoena Witnesses	-	✓	✓	✓	✓	✓
Seek Enforcement via Court	✓	✓	✓	✓	✓	✓

Dept. = State's Department of Health or equivalent
HSP = Health Systems Planning Unit – Connecticut's CON agency

TABLE F.2: Subpoena Powers of Reviewing Entity for Relevant Investigations[xiii]

	CT	MA	MA	MA
Type of Entity	HSP	HPC	AG	AG
Scope	CMIR	CMIR	Monitor Healthcare Market Trends	Investigating Unfair Methods of Competition
Answer Interrogatories	-	-	✓	-
Testify Under Oath	-	-	✓	✓
Produce Documents	✓	✓	✓	✓
Subpoena Witnesses	-	-	-	✓
Seek Enforcement via Court	-	-	-	-

CMIR = Cost and Market Impact Review
HSP = Health Systems Planning Unit – Connecticut's CON agency
HPC = Health Policy Commission – Massachusetts independent public agency to review market impacts

Appendix G: Requirements for Post Transaction Independent Monitors[xiv]

	CA	CT	MA
Type	Nonprofit Acquiree	Limited CON*	Conversion
Independent Consultants or Monitor	✓	✓	✓
Scope of Monitoring	Review and evaluate compliance	CON Compliance	To monitor and report on community healthcare access by the entity, including levels of free care provided by the entity.
Purchasers Pay for Consultants	✓	✓	✓
Results Released to Public	✓	-	-
Performance Improvement Plan	-	✓	-
Length	Agreement + 2 years	3	3

** Such monitors are only required when (A) a transaction involves the transfer of ownership of a hospital, (B) the purchaser is a hospital, whether located within or outside the state, that had net patient revenue for fiscal year 2013 in an amount greater than one billion five hundred million dollars or a hospital system, whether located within or outside the state, that had net patient revenue for fiscal year 2013 in an amount greater than one billion five hundred million dollars, or any person that is organized or operated for profit, and (C) such application is approved.*[87]

[87] CONN. GEN. STAT. § 19a-639.

Endnotes for Tables and Appendices

[i] *See* CAL. CORP. CODE §§ 5914, 5920; CONN. GEN. STAT. §§ 19a-486a, 19a-486i, 19a-638; MASS. GEN. LAWS ch. 6D, § 13; MASS. GEN. LAWS ch. 180, § 8A(d); 23 R.I. GEN. LAWS §§ 23-17.14-4; 23-17.14-5; *Review Protocol for Fundamental Change Transactions Affecting Health Care Nonprofits*, OFF. OF THE ATT'Y GEN. COMMONWEALTH OF PENNSYLVANIA, https://www.attorneygeneral.gov/protect-yourself/charitable-giving/review-protocol-for-fundamental-change-transactions-affecting-health-care-nonprofits/ (last visited May 30, 2020) [hereinafter *Pennsylvania Review Protocol*].

[ii] CONN. GEN. STAT. § 19a-486a ("[n]o nonprofit hospital shall enter into an agreement to transfer a material amount of its assets or operations or a change in control of operations to a person that is organized or operated for profit without first having received approval"); CONN. GEN. STAT. § 19a-486i(b)-(c) ("At the same time that any person conducting business in this state that files merger, acquisition or any other information regarding market concentration with the Federal Trade Commission or the United States Department of Justice, in compliance with the Hart-Scott-Rodino Antitrust Improvements Act, [. . .] such person shall provide written notification to the Attorney General of such filing [. . .] Not less than thirty days prior to the effective date of any transaction that results in a material change to the business or corporate structure of a group practice, the parties to the transaction shall submit written notice to the Attorney General of such material change"); CONN. GEN. STAT. § 19a-638 ("A certificate of need issued by the unit shall be required for [. . .] [a] transfer of ownership of a health care facility [or] [. . .] [a] transfer of ownership of a large group practice to any entity" except as specified"); Mass. Gen. Laws Ann. ch. 6D, § 13 (notify Center for Health Information and Analysis, *Health Policy Commission, Attorney General);* MASS. GEN. LAWS ch. 180, § 8A(d) (a nonprofit acute-care hospital "shall give written notice of not less than 90 days to the attorney general [. . .] before it enters into a sale, lease, exchange, or other disposition of a substantial amount of its assets or operations with a person or entity other than a public charity"); 23 R.I. Gen. Laws Ann. § 23-17.14-4 (""Conversion" means any transfer by a person or persons of an ownership or membership interest or authority in a hospital, or the assets of a hospital"); 23 R.I. GEN. LAWS § 23-17.14-5 ("A conversion shall require review and approval from the department of attorney general and from the department of health"); 105 MASS. CODE REGS. 100.735; *Pennsylvania Review Protocol*, *supra* note i. ("[w]henever a nonprofit, charitable health care entity enters into a transaction effecting a fundamental corporate change which involves a transfer of ownership or control of charitable assets, regardless of the form of the transaction contemplated [. . .] and regardless of whether the other party or parties to the transaction are a nonprofit, mutual benefit or for-profit organization; the Office of Attorney General, as parens patriae, must review each transaction."). *See* CAL. CORP. CODE § 5914, 5920.

[iii] CONN. GEN. STAT. § 19a-486a ("[n]o nonprofit hospital shall enter into an agreement to transfer a material amount of its assets or operations or a change in control of operations to a person that is organized or operated for profit without first having received approval"); CONN. GEN. STAT. § 19a-486i(b)-(c) ("At the same time that any person conducting business in this state that files merger, acquisition or any other information regarding market concentration with the Federal Trade Commission or the United States Department of Justice, in compliance with the Hart-Scott-Rodino Antitrust Improvements Act, [. . .] such person shall provide written notification to the Attorney General of such filing [. . .] Not less than thirty days prior to the effective date of any transaction that results in a material change to the business or corporate structure of a group practice, the parties to the transaction shall submit written notice to the Attorney General of such material change"); CONN. GEN. STAT. § 19a-638 ("A certificate of need issued by the unit shall be required for [. . .] [a] transfer of ownership of a health care facility [or] [. . .] [a] transfer of ownership of a large group practice to any entity" except as specified"); MASS. GEN. LAWS ch. 6D, § 13 (notify Center for Health Information and Analysis, Health Policy Commission, Attorney General for material changes); 23 R.I. GEN. LAWS § 23-17.14-4 (""Conversion" means any transfer by a person or persons of an ownership or membership interest or authority in a hospital, or the assets of a hospital"); 23 R.I. GEN. LAWS § 23-17.14-5 ("A conversion shall require review and approval from the department of attorney general and from the department of health"); 105 MASS. CODE REGS. 100.735 (requiring Determination of Need for transfer of ownership); *Pennsylvania Review Protocol*, *supra* note i ("[w]henever a nonprofit, charitable health care entity enters into a transaction effecting a fundamental corporate change which involves a transfer of ownership or control of

charitable assets, regardless of the form of the transaction contemplated [. . .] and regardless of whether the other party or parties to the transaction are a nonprofit, mutual benefit or for-profit organization; the Office of Attorney General, as parens patriae, must review each transaction."). *See* CAL. CORP. CODE §§ 5914, 5920.

[iv] CAL. CORP. CODE § 5915, Cal. Corp. Code § 5921; CONN. GEN. STAT. § 19a-486a ("The executive director and the Attorney General shall, no later than twenty days after the date of their receipt of the application, provide written notice to the nonprofit hospital and the purchaser of any deficiencies in the application. Such application shall not be deemed complete until such deficiencies are corrected."); CONN. GEN. STAT. § 19a-486i(b)-(c) ("Not less than thirty days prior to the effective date of any transaction that results in a material change to the business or corporate structure of a group practice, the parties to the transaction shall submit written notice to the Attorney General of such material change"); CONN. GEN. STAT. § 19a-638; CONN. GEN. STAT. § 19a-638; CONN. GEN. STAT. § 19a-639f; MASS. GEN. LAWS ch. 6D, § 13 (notify "not fewer than 60 days before the date of the proposed change;" "any proposed material change shall not be completed until at least 30 days after the commission has issued its final report [. . . .] The commission shall issue its final report on the cost and market impact review within 185 days from the date that the provider or provider organization has submitted notice to the commission").

MASS. GEN. LAWS ch. 180, § 8A(d) (a nonprofit acute-care hospital "shall give written notice of not less than 90 days to the attorney general"); 110 R.I. CODE R. 30-00-3.4 ("The Department of Attorney General and Department of Health shall each approve, approve with conditions directly related to the proposed conversion, or disapprove the application within one hundred twenty (120) days of the date of acceptance of the application."); *Pennsylvania Review Protocol*, *supra* note i (notify "at least 90 days prior to the contemplated date of its consummation").

[v] CONN. GEN. STAT. § 19a-639; MASS. GEN. LAWS ch. 180, § 8A; 23 R.I. GEN. LAWS § 23-17.14-11; 23 R.I. GEN. LAWS § 23-17.14-12; 23 R.I. GEN. LAWS § 23-17.14-15; 23 R.I. GEN. LAWS § 23-17-14.3; CAL. CODE REGS. TIT. 11, § 999.5; 216 R.I. CODE R. 40-10-23.7; 216 R.I. CODE R. 40-10-23.8; *Pennsylvania Review Protocol*, *supra* note i.

[vi] CAL. CORP. CODE §§ 5919, 5924; MASS. GEN. LAWS ch. 180, § 8A; CONN. GEN. STAT. § 19a-486c; CONN. GEN. STAT. Ann. § 19a-486d; 23 R.I. GEN. LAWS § 23-17.14-13; 23 R.I. GEN. LAWS § 23-17.14-13; CAL. CODE REGS. tit. 11, § 999.5; *Pennsylvania Review Protocol*, *supra* note i.

[vii] MASS. GEN. LAWS ch. 6D, § 13; CONN. GEN. STAT. § 19a-486i; 23 R.I. GEN. LAWS § 23-17.14-4. *See* CAL. CODE REGS. tit. 11, § 999.5; CAL. CORP. CODE § 5920; *Pennsylvania Review Protocol*, *supra* note i. This shall not apply to an agreement or transaction if the other party to the agreement or transaction is an affiliate of the transferring nonprofit corporation or entity, and the corporation or entity has given the Attorney General 20 days advance notice of the agreement or transaction.

[viii] CAL. CORP. CODE § 5917; CONN. GEN. STAT. § 19a-486c; CONN. GEN. STAT. § 19a-486d; MASS. GEN. LAWS ch. 180, § 8A; 23 R.I. GEN. LAWS § 23-17.14-7; 23 R.I. GEN. LAWS § 23-17.14-8; 23 R.I. GEN. LAWS § 23-17.14-15; CAL. CODE REGS. tit. 11, § 999.5; 216 R.I. Code R. 40-10-23.6; *Pennsylvania Review Protocol*, *supra* note i.

[ix] Cal. Corp. Code § 5923; Conn. Gen. Stat. Ann. § 19a-639; 23 R.I. Gen. Laws Ann. § 23-17.14-10; 23 R.I. Gen. Laws Ann. § 23-17.14-11; Cal. Code Regs. tit. 11, § 999.5; 216 R.I. Code R. 40-10-23.7; PENNSYLVANIA OFFICE OF ATTORNEY GENERAL, REVIEW PROTOCOL FOR FUNDAMENTAL CHANGE TRANSACTIONS AFFECTING HEALTH CARE NONPROFITS, available at https://www.attorneygeneral.gov/protect-yourself/charitable-giving/review-protocol-for-fundamental-change-transactions-affecting-health-care-nonprofits/.

[x] MASS. GEN. LAWS ch. 6D § 13; CONN. GEN. STAT. § 19a-639f.

[xi] CAL. CODE REGS. tit. 11, § 999.5.

[xii] CAL. GOV'T CODE § 11181; CAL. GOV'T CODE § 11187; CONN. GEN. STAT. § 19a-486c; CONN. GEN. STAT. § 19a-486d; CONN. GEN. STAT. § 19a-633; CONN. GEN. STAT. § 19a-639f; 23 R.I. GEN. LAWS § 23-17.14-14; 23 R.I. GEN. LAWS § 23-17.14-14.

[xiii] CONN. GEN. STAT. § 19a-639f; MASS. GEN. LAWS ch. 12 § 11N; MASS. GEN. LAWS ch. 93A, § 6; MASS. GEN. LAWS ch. 6D, § 13.

[xiv] CAL. CORP. CODE § 5919; CAL. CORP. CODE § 5924; CONN. GEN. STAT. § 19a-639; MASS. GEN. LAWS ch. 180, § 8A; CAL. CODE REGS. tit. 11, § 999.5.