

NOVEMBER 9, 2023

*If you have any questions
about this Advisory,
please contact:*

JODY ERDFARB
203.363.7608
jerdfarb@wiggin.com

MADIHA MALIK
212.551.2604
mmalik@wiggin.com

MAUREEN WEAVER
203.498.4384
mweaver@wiggin.com

NEW CONNECTICUT LAW OVERHAULS CHANGE OF OWNERSHIP REQUIREMENTS FOR HEALTH CARE FACILITIES LICENSED BY DPH

Starting October 1, 2023, health care facilities and institutions licensed by the Connecticut Department of Public Health (DPH) became subject to significant requirements that apply when the facility or institution undergoes a change of ownership (CHOW).

Public Act 23-122, "An Act Concerning the Department of Public Health's Recommendations Regarding Change in Ownership of Health Care Facilities," overhauls the current requirements for licensed health care facilities and institutions seeking DPH approval to change ownership. The Act heightens and enhances state scrutiny of prospective buyers of health care facilities, particularly nursing homes.

The Act's new requirements apply to all health care facilities and institutions licensed by DPH, including, but not limited to, hospitals, hospice facilities, residential care homes, nursing homes, home health care agencies, home health aide agencies, hospice agencies, behavioral health facilities, assisted living services agencies, outpatient clinics and surgical facilities. These requirements apply when a facility or institution will be sold to a new owner, or when there is a change in the ownership structure of the licensed entity, which is referred to as a "beneficial change of ownership."

The following is a general summary of the key changes made to Connecticut General Statutes § 19a-493 and related action steps for individuals and providers.

SUMMARY

- **Percentage Ownership.** The prior version of the statute required DPH approval only for a CHOW that involved a transfer of 10% or more of the ownership interest in the licensee. The Act now requires DPH approval of *any* change of ownership or beneficial ownership. DPH may waive the requirement to file an application in full or in part if the proposed transaction results in a change of ownership or beneficial ownership of 5% or less of the ownership interest in the licensee.
- **120-Day Notice Timeframe.** Under prior law, notice of a CHOW had to be submitted to DPH 120 days in advance of the change. In practice, this notice was generally a short letter describing the transaction. However, the Act now requires that the lengthy application itself be filed 120 days in advance of the change. As noted below, the Act specifies several items that must be addressed in the application.

CONTINUED

NEW CONNECTICUT LAW OVERHAULS CHANGE OF OWNERSHIP REQUIREMENTS FOR HEALTH CARE FACILITIES...

- **Transfer to Relatives.** Transactions resulting in a CHOW to a person related to an owner or beneficial owner by blood or marriage (parent, spouse, child, brother, sister, aunt, uncle, niece or nephew) are no longer exempt from the application and approval requirements. However, for these transactions, DPH may waive the requirement (discussed below) to disclose information on health care facilities owned, operated, or managed by the applicant during the prior five years. If DPH denies the CHOW request, the Act prohibits any person related to that applicant by blood or marriage from subsequently applying to acquire any ownership interest in the same facility or institution.
- **Exempt Transactions.** The Act adds the following exemptions from the CHOW requirements:
 - **Certain Hospital Transactions:**
A change of ownership of, or to, a licensed, federally tax-exempt hospital that is exempt from the approval requirements by the Executive Director of the Office of Health Strategy and the State's Attorney General under existing law, assuming the owner provides any requisite information to DPH
 - **Small Scale Physician Ownership Changes in Outpatient Surgery Centers:** A change of ownership or beneficial ownership resulting in the transfer to a physician of 10% or less of the ownership interest in an outpatient surgical facility, provided the requisite information is submitted to DPH to update the facility's licensing information
- **Application Content.** The Act requires that the following information be disclosed to DPH in CHOW applications. Some of this information was already required to be disclosed per DPH's CHOW application form, but other requirements are new.
 - A cover letter identifying the facility or institution undergoing the CHOW, including name, address, county, and licensed bed capacity
 - A description of the proposed transaction, including the name of each current owner of the facility, the name of each proposed new owner or beneficial owner, and the name of each owner of any non-publicly traded parent corporation of each proposed new owner and beneficial owner
 - As applicable to the CHOW, the proposed new owner's organizational chart, the proposed new owner's parent business entity's organizational chart, the organizational chart of each wholly owned subsidiary of each proposed new owner, and the current owner's organizational chart showing any changes in beneficial ownership
 - A copy of the agreement of sale or other transfer of ownership interests
 - A copy of any lease or management agreements that will be in effect after the transaction
 - Whether any proposed new owner has been convicted or pled guilty to a charge of fraud, patient or resident abuse or neglect, or a crime of moral turpitude

CONTINUED

NEW CONNECTICUT LAW OVERHAULS CHANGE OF OWNERSHIP REQUIREMENTS FOR HEALTH CARE FACILITIES...

- The name and address of any licensed health care facility owned, operated or managed by each proposed new owner and beneficial owner during the five years preceding the date on which the application is submitted, including any direct or indirect interests and interests in intermediate entities and parent, management and property companies and other related entities. In addition, applications must state whether each such disclosed facility has been subject to:
 - A pending complaint, investigation or licensure action by a governmental authority;
 - Three or more civil penalties imposed by DPH final order or imposed by another state during the two years prior to submission of the application;
 - State-imposed Medicare or Medicaid sanctions, other than civil penalties of \$20,000 or less;
 - Medicare or Medicaid provider agreement termination or nonrenewal;
 - State citation or federal deficiency in connection with an inappropriate discharge or denial of admission; and
 - State citation or federal deficiency in the five years prior to submission of the application that identified a “serious risk to the life, safety, or quality of care” of the facility’s patients or residents.
- The Act defines “serious risk to the life, safety, or quality of care” to include, but not be limited to, any violation of state licensure or federal certification requirements that resulted in any of the following outcomes:
 - State or federal agency action to ban, curtail, or temporarily suspend facility admissions or to suspend or revoke a facility’s license
 - DPH or Center for Medicare and Medicaid Services (CMS) action to decertify, terminate, or exclude from Medicaid or Medicare participation, or deny payment for new admissions imposed only due to the facility’s failure to correct identified regulatory noncompliance
 - Federal deficiency cited as a pattern or widespread scope of actual harm or immediate jeopardy (Scope and Severity Levels H, I, K, or L)
 - CMS designation that the facility is a “poor performer” based on a finding of “substandard quality of care” or immediate jeopardy on a current survey or a survey in the preceding two years. “Substandard quality of care” is defined as the failure to meet one or more requirements of 42 CFR § 483.13 (resident abuse or restraint), 42 CFR § 483.15 (admission, transfer and discharge rights) or 42 CFR § 483.25 (quality of care), that are cited as immediate jeopardy (Scope and

CONTINUED

NEW CONNECTICUT LAW OVERHAULS CHANGE OF OWNERSHIP REQUIREMENTS FOR HEALTH CARE FACILITIES...

Severity Levels J, K, or L), a pattern of or widespread actual harm that is not immediate jeopardy (Scope and Severity Levels H or I) or a widespread potential for more than minimal harm but less than immediate jeopardy, with no actual harm (Scope and Severity Level F)

- Facility's failure on a second revisit to correct previously identified deficiencies and that caused CMS to impose a denial of payment for new admissions or DPH to restrict facility admissions

■ **Facility Inspection.** Previously DPH required a physical plant inspection whenever the application involved a facility sale. The Act changes that to a discretionary decision, stating that DPH *may* conduct inspections, and based on the broad language in the Act, clinical inspections may also be required.

■ **DPH's Evaluation of the CHOW Application.** DPH always had broad discretion to evaluate CHOW applications, but the Act now requires DPH to consider a licensure application based on each proposed new owner and beneficial owner's character and competence, quality of care, and the federal and state compliance history of the health care facilities owned, operated, or managed by each proposed owner or beneficial owner in the

five years prior to submission of the licensure application. DPH may deny the application if any of the disclosed facilities were subject to any adverse action disclosed in the application (e.g., termination of a Medicare or Medicaid provider agreement or certain state citations or federal deficiencies) or has continuing state licensure or federal certification standard violations, or a pattern of them. DPH may also deny approval because of the applicant's criminal conviction or guilty plea to any crime of fraud, patient or resident abuse or neglect, or a crime of moral turpitude.

Importantly, while DPH has the discretion to consider those factors, Connecticut General Statutes § 19a-528a *requires* denial of the CHOW application, except for good cause shown, if the "potential nursing home licensee or owner" has had: (1) three or more civil penalties imposed by DPH or civil penalties imposed pursuant to the statutes or regulations of another state during the last two years; (2) in any state, sanctions, other than civil penalties of less than \$20,000, imposed through final adjudication under the Medicare or Medicaid program within the last five years; or (3) in any state, the buyer's Medicare or Medicaid provider agreement terminated or not renewed within the last five years.

CONTINUED

NEW CONNECTICUT LAW OVERHAULS CHANGE OF OWNERSHIP REQUIREMENTS FOR HEALTH CARE FACILITIES...

■ **Grounds to Temporarily Delay**

Decision. The Act expressly allows DPH to delay its decision on a licensure application if DPH determines that a pending investigation involving the actions of the applicant at any facility previously disclosed, if substantiated, would constitute a threat to the life, safety or quality of care of the patients or residents. In such a case, DPH may delay its decision on the licensure application until there is a final determination of the investigation.

In addition to making these extensive revisions to the CHOW process, the Act also amends prior law at Connecticut General Statutes § 19a-491a to reduce the disclosure threshold of the ownership interests of an initial owner of a nursing home from 10% to 5%. Specifically, any person with 5% or greater ownership interests in the initial owner of the nursing home must now be disclosed to DPH. Since DPH has recently taken the position that for CHOWs, any new prospective owner must be disclosed to DPH regardless of percentage interest ownership amount, this change to require the disclosure of only owners with a 5% or greater interest in the ownership of a new nursing home is confusing.

The Act also amends Connecticut General Statutes § 19a-528a to require DPH to update the notice on its nursing home CHOW application to provide that any person with at least 5% ownership interests in the nursing home or the

entity that owns the nursing home may be subject to civil or criminal liability and administrative sanctions under federal and state law for the abuse or neglect of a nursing home resident committed by a nursing home employee.

Also note that **Public Act 23-48**, which went into effect July 1, 2023, imposes the following additional required disclosures to DPH for a person seeking a license to establish, conduct, operate or maintain a nursing home:

- If a private equity company or real estate investment trust (REIT) owns any portion of the nursing home's business, DPH must be provided with the information regarding the private equity company and/or REIT that CMS requires to be disclosed on federal **Form CMS-855a** (the Medicare Enrollment Application) and in accordance with 42 CFR § 424.516 (requiring certification of compliance with certain federal requirements and reporting of changes) or 42 CFR § 455.104 (requiring disclosure regarding ownership and control by Medicaid providers), as amended from time to time.
- All applicants for nursing home licensure must provide DPH with audited and certified financial statements of the owner, including (1) balance sheets at the end of the most recent fiscal year and (2) income statements for the most recent fiscal year or for a shorter period if the owner was in existence for a shorter period.

CONTINUED

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

NEW CONNECTICUT LAW OVERHAULS CHANGE OF OWNERSHIP REQUIREMENTS FOR HEALTH CARE FACILITIES...

ACTION STEPS

- As of the date of this advisory, DPH has issued no guidance on the new CHOW requirements and has not yet issued the waiver application that it is required to develop under the Act. Providers entering a CHOW should ensure that they are using current and proper forms.
- Individuals and health care facilities that may be undergoing a CHOW should be aware of how these new requirements may impact DPH's approval of a licensure application. For nursing home providers, many of the Act's new stringent application requirements may prove onerous to satisfy. For transactions involving the sale of a facility or institution, particularly nursing homes, sellers should consider conducting initial diligence early in the transaction (before accepting a bid or entering a letter of intent) to identify potential

barriers to DPH approval of a prospective buyer's licensure application, such as the prospective buyer's history of state and federal fines and other enforcement measures.

- Applicants should carefully consider whether the documents now required to be submitted to DPH contain any proprietary information that should be protected from public disclosure. All documents and information submitted to DPH as part of the change of ownership or beneficial change of ownership application are subject to disclosure in the Freedom of Information Act.

If you would like assistance with assessing a change of ownership or beneficial ownership transaction in light of the new requirements, or if you have any other questions regarding the new requirements, please feel free to contact **Jody Erdfarb, Madiha Malik** or **Maureen Weaver**.