

Office of the Attorney General of the State of New York:  
Response to Public Comment Approval of Sale of Assets Pursuant to Sections 510 and 511-a of the Not-  
for-Profit Corporation Law submitted by New York State Catholic Health Plan, Inc.

Response Dated June 14, 2018

New York State Catholic Health Plan, Inc., doing business as Fidelis Care New York (“Fidelis”), submitted a petition verified on May 7, 2018 (the “Petition”) to the Attorney General of the State of New York (the “Attorney General”) under Sections 510 and 511-a of the Not-for-Profit Corporation Law (“N-PCL”) for review and approval of the sale of substantially all of the assets of Fidelis (including its managed care businesses) to Centene Corporation, a for-profit corporation.

N-PCL Section 511-a (c) sets forth the standard of review by the Attorney General with respect to the relief requested by Petitioner in the Petition: “(c) If it shall appear, to the satisfaction of the attorney general that the consideration and the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation or the interests of the members will be promoted, the attorney general may authorize the sale, lease, exchange or other disposition of all or substantially all the assets of the corporation, as described in the petition, for such consideration and upon such terms as the attorney general may prescribe. The authorization of the attorney general shall direct the disposition of the consideration to be received thereunder by the corporation.”

N-PCL Section 511-a (b) permits the Attorney General, in its discretion, to direct that notice of a petition be provided to any interested person. Fidelis, as stated in paragraph 199 of the Petition, acknowledged that the Attorney General would provide public notice of the Petition. On May 7, 2018, the Attorney General issued a Notice of Petition and Request for Public Comment requesting comments to the petition for a period ending on May 23, 2018. Interested parties were invited to submit comments by electronic mail only to [Fidelis.Transaction@ag.ny.gov](mailto:Fidelis.Transaction@ag.ny.gov). Copies of the Notice, an electronic copy of the Petition and an undertaking from the State of New York regarding its use of certain of the proceeds of the transaction were made available at <https://ag.ny.gov/fidelis>. In addition, all public comments received from verified email addresses have been posted at <https://ag.ny.gov/fidelis>.

The Attorney General recorded receipt of almost 6,000 comments in response to the Notice, almost all of which provided support for the transaction and the proposed use of proceeds. Approximately 40 people and organizations raised issues concerning or opposed the transaction. The Attorney General provides the following responses to the public comments concerning the latter group of comments.

	<b><u>TOPIC</u></b>	<b><u>COMMENT AND ATTORNEY GENERAL RESPONSE</u></b>
1	Support for Transaction	We received 5,887 comments in support of the transaction, urging the Attorney General's office to approve the sale of assets of Fidelis to Centene.
2	Objection <sup>1</sup> With No specific reason	We received 2 comments that objected to the Petition for approval of the sale of Fidelis to Centene and in which no reason was given for the objection.
3	Objection Regarding 14-Day Notice Period; Translation	<p>We received 16 comments expressing concern that a 14-day window for submitting comments to the Attorney General is too short, as the volume of material did not allow for adequate review and comment.</p> <p><u>Attorney General Response:</u> N-PCL Sections 511 and 511-a do not require a public comment period on any application made to the Attorney General or the Supreme Court on notice to the Attorney General. However, due to the broad impact this sale could have upon members of the public, and the large class of charitable beneficiaries, the Office of the Attorney General used its discretion to allow for a public comment period. From the period commencing the evening of May 7, 2018, and ending at midnight on May 23, 2018, almost 6,000 comments were received from members of the public. The period allotted for comments allowed for ample response.</p>
4	Objection Regarding Lack of Public Hearings Around the State	<p>We received 16 comments that requested that there should have been public hearings around the state on the proposed transaction prior to the approval of the Attorney General.</p> <p><u>Attorney General Response:</u> An application made to the Attorney General's office for administrative determination pursuant to N-PCL Section 511-a does not include a statutory requirement for a public hearing, or any public comment period. However, due to the broad impact this sale could have upon members of the public, and the large class of charitable beneficiaries, the Office of the Attorney General used its discretion to allow for a public comment period. From the period commencing on the evening of May 7, 2018, and ending at midnight on May 23, 2018, almost 6,000 comments were received from members of the public.</p>
5	Objection Regarding	We received 14 comments that requested that, prior to final determination by the Attorney General, notice should be sent to current

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<sup>1</sup> For purposes of this response, the OAG categorized as an "objection" any comment that was not expressly in support of the transaction. That includes many comments that did not expressly use the word "object" or "oppose" but raised questions, comments, suggestions and/or concerns about the transaction. Some comments categorized as "objection" raised more than one topic of concern. Therefore, issues raised in one letter may be included in more than one topic below.

	Lack of Plan Member Notice and Translation of Notice and Petition	<p>Fidelis enrollees to let them know of the opportunity to comment. There was also comment that the need for notice to plan members should also be required due to recent Fidelis advertisements that the commenter determined did not sufficiently explain the pending sale.</p> <p><u>Attorney General Response:</u> N-PCL Sections 510 and 511 outline what is required to be included in a sale petition under N-PCL Section 511-a. Under N-PCL Sections 510 and 511 members who are entitled to vote must consent to the terms of the transaction and the use of proceeds. As stated in its Petition, Fidelis is a membership organization whose membership is set forth in its Bylaws and is limited to the eight Diocesan Bishops of the State and Ecclesiastical Province of New York (the “Members”). Petition, ¶ 10. The Petition states that the Members approved the transaction and attached to the Petition written evidence of the approval. Petition, ¶¶ 194, 195, Exs. 48, 49. Plan members and consumers had the opportunity to comment in response to the public notice and comment period provided by the Attorney General, in its discretion. N-PCL Section 511-a does not include the review of consumer advertising materials in its mandate.</p>
6	Objection Regarding Use of State Funds	<p>We received 9 comments about New York State’s use of the contribution of \$1.4 billion from Fidelis, as restricted by the May 6, 2018 letter from the Division of the Budget to the Attorney General. We also received comment that the State should be prohibited from using any portion of the proceeds to reduce the state Medicaid and health care budget.</p> <p><u>Attorney General Response:</u> The Petition, as supplemented by the letter to the Attorney General from the New York State Division of Budget dated May 6, 2018, provides for payment to the State of funds that will be used exclusively for improving access to affordable healthcare and funding healthcare needs. Those purposes are consistent with the purposes for which Fidelis was formed and meet the requirements of N-PCL 511-a that the proceeds of the sale be used for the purposes of the selling organization. The New York State Division of the Budget has agreed to use the funds for the required purposes and to maintain and post on the Internet at <a href="http://www.budget.ny.gov">www.budget.ny.gov</a> quarterly reports of the expenditure of the funds. Details of the reasons for and terms of the payments to the State of New York are set forth in the Petition at paragraphs 137 through 139 and the May 6 letter to the Attorney General and were made available at [<a href="https://ag.ny.gov/fidelis">https://ag.ny.gov/fidelis</a>] during the comment period.</p>
7	Objection Regarding Sale of Charitable Assets to	<p>We received 10 comments expressing concern about the sale of a not-for-profit organization to a for-profit entity.</p> <p><u>Attorney General Response:</u> N-PCL Section 511-a requires that, when a charity’s assets are sold, whether to a not-for-profit or for-profit entity,</p>

For-Profit Entity	<p>the Attorney General must determine that the charitable purposes of the corporation and the interests of the charity and its members will be promoted by the sale. The proceeds of the sale must be used to further the charitable purposes of the selling organization. As more fully described in the Petition, Centene has made commitments to the Attorney General regarding: (a) the maintenance of product offerings; (b) the appointment of an enrollee advocate to serve on the board of the newly formed New York Quality Healthcare Corporation ("New Fidelis") , the New York corporation approved by the Department of Health to acquire the assets and liabilities of Fidelis; (c) the agreement of for New Fidelis to pay \$300,000 to hire an independent expert to prepare an annual report, over a three-year period, on the impact of the sale transaction on the patient population, and make recommendations to the New Fidelis board based on the report; and (d) certain other matters. See Petition, ¶ 125, Ex. 25. The approvals of the Department of Health and Department of Financial Services, annexed to the Petition, also include commitments for Centene's operations after the closing. Petition, ¶¶ 126 through 133, Exs. 26 through 29. In addition, as with Fidelis Care, Centene's operations and fulfillment of the terms described in the petition will be subject to the ongoing oversight of the Attorney General, the Department of Health and the Department of Financial Services.</p>
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| 7 | <p>Objection to Sale of Assets to Centene Regarding the One - Year Commitment to Comply with Ethical and Religious Directives of Catholic Healthcare Services</p> | <p>We received 6 comments claiming that Centene's one-year commitment to comply with the Ethical and Religious Directives for Catholic Healthcare Services as applied to reproductive rights was too long. We also received comment regarding concerns about the potential one year ethical directive compliance impact on other health issues, namely end of life care and LGBT health care services (including fertility related services, HIV prevention medication or treatment, and gender-affirming healthcare to transgender people). We also received comment opposing the elimination of the ethical directives in the Fidelis Medicaid plan after the closing.</p> <p><u>Attorney General Response:</u></p> <p>In its asset purchase agreement in this transaction, Centene agreed that, "to the extent permitted by applicable law and government authorities", for one year following the closing of the transaction Centene would "use commercially reasonable good-faith efforts to comply with the protocols and policies ... relating to the ethical and religious directives for Catholic Health Care Services in connection with the operations of the business in the state of New York." Petition, Ex. 1, Section 6.22(b).</p> <p>The Petition states that Petitioner, as a Catholic health care organization, does not pay, reimburse, arrange for, or provide any</p> |
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service or participate in any activity that is not in accordance with the Ethical and Religious Directives for Catholic Healthcare Services issued by the United States Catholic Conference, as interpreted by the Bishop of the Diocese in which the provider renders services to members; these Directives set forth specific medical services that Catholic health care entities cannot provide, including contraception, abortion, sterilization, and extracorporeal (in vitro) fertilization. Petition, ¶ 1 including footnote 1. Accordingly, it is the understanding of the Attorney General that in certain of Fidelis' plans, certain reproductive health services required by law were provided to consumers by a special mechanism through a third party provider or, for certain government-funded plans like Medicaid, only if that consumer sought the services directly and showed proof of that person's plan eligibility.

As the Attorney General was concerned that these special mechanisms would end after the closing by Centene within a shorter period than one year from the closing (which we have been informed by Fidelis may occur as early as July 1, 2018), the undertaking by Centene set forth in ¶ 9 of Ex. 25 to the Petition therefore states that the final approval of the Attorney General of the transaction will be expressly conditioned on:

"The provision by New Fidelis of all family planning services and medically necessary abortions, as required by applicable law, for all plans on and after January 1, 2019, and the adoption by New Fidelis, as soon as practicable following the closing of the Transaction, of updated internal manuals, customer service scripts, website materials and other relevant information that proactively provides adequate information on the availability of such services as of the closing through current mechanisms and on the planned transition of services."

Petition, Ex. 25, ¶ 9.

Although the Attorney General is not aware of any special mechanisms employed by Fidelis with respect to any legally-required health services beyond reproductive health services, in response to comments, the Attorney General has required that the final Centene undertaking be broadened as follows:

"Centene confirms that it is aware that Attorney General approval will be expressly conditioned upon the provision by New Fidelis of all services, as required by applicable law, for all plans operated by Centene on and after January 1, 2019, and the adoption by New Fidelis, as soon as practicable following the closing of the Transaction, of updated internal manuals, customer service scripts, website materials and other relevant information that proactively provides adequate information on the availability of such services as of

the closing through current mechanisms and on the planned transition of services.”

Attorney General Approval, Exhibit E, ¶ 9.

- 8      Objection      We received 12 comments expressing pleasure that the Centene  
Based on the      undertaking included a commitment by New Fidelis to agree to pay  
Need for      \$300,000 to the Attorney General to hire an independent expert to  
Additional      prepare annual reports, over a three-year period, on the impact of the  
Conditions      asset sale transaction on the patient population, and make  
Prior to      recommendations to the New Fidelis board based on the report.  
Approval of      Commenters noted that the monitoring of health care coverage and  
Petition-      access in the community is very important for ensuring that any  
Centene      emerging issues may be brought to the attention of the board and  
Undertakings      addressed by Centene. However, commenters noted that it was  
                            unfortunate the provision would only be for three years, and  
                            encouraged the Attorney General to extend for a longer period.
- Attorney General Response: The Attorney General was concerned that  
                            the undertaking from Centene regarding the impact on the Medicaid  
                            patient population be for a reasonable period to allow emerging issues  
                            to be monitored after the closing. After extensive negotiation with  
                            Centene, the Attorney General agreed to a three-year monitoring period  
                            as reflected in the Centene undertaking. Petition, Ex.25. This period  
                            mirrors the three-year period for many of Centene’s conditions  
                            regarding the commercial insurance market products in the approval of  
                            the Department of Financial Services. Petition, Ex. 29. [We note that  
                            the undertaking provides that Centene will reimburse an independent  
                            expert selected by the Attorney General, not for direct payment to the  
                            Attorney General as some of the comments stated.]
- 9      Objection      We received 31 comments with suggestions for additional conditions on  
Based on the      the Mother Cabrini Health Foundation (the “Foundation”) prior to  
Need for      approval of the Petition.  
Additional      Attorney General Response: Under the N-PCL, management of the  
Conditions      assets of a charity is the responsibility of the board of directors, which is  
Prior to      obligated to assure that the mission of the charity is carried out. The  
Approval-      Attorney General’s responsibility under N-PCL Section 511-a is to  
Mother      evaluate the use of the proceeds proposed in the petition and to  
Cabrini      determine whether “the purposes of the corporation will be served” by  
Health      the proposed use. In this case, we have determined that the charitable  
Foundation      purposes of the corporation and the proposed use of the proceeds will  
                            be served by the Foundation. The Foundation has submitted an  
                            extensive plan detailing the Foundation’s proposed use of proceeds,  
                            which are consistent with the charitable purposes of Fidelis, and the  
                            Foundation’s proposed governance, which is consistent with the

mandates of the N-PCL for a constitution of the governing bodies of a charitable corporation. Our responses to key specific comments are set forth below.

(1) We received comment that Fidelis' health care assets should remain dedicated to high priority purposes that are consistent with its long standing nonprofit charitable mission to expand health insurance coverage and access to care for New Yorkers, especially by expanding health insurance coverage and care, reducing barriers to coverage, overcoming gaps and barriers to care, supporting consumer assistance programs to ensure patients are enrolled and stay enrolled, and improving customer experience of care.

Attorney General Response: N-PCL Section 511-a requires that proceeds from the sale of a charity's assets be used to further the charitable purposes of the selling organization. In determining whether or not to approve the proposed use of proceeds for the charitable purposes and plans of the Foundation, we conducted an extensive review of the Petition to identify: (1) the history and sources of funds of Fidelis; (2) the purposes and powers of Fidelis (3) the activities in fact carried out and services actually provided by Fidelis; (4) the relationship of the activities and purposes of the Foundation to those of Fidelis; and (5) the basis for the distribution of proceeds recommended by the board and members of Fidelis.

The Petition includes extensive disclosure of the purposes of Fidelis, the proposed purposes of the Foundation, the work of the Fidelis board and members to develop charitable purposes for the new Foundation, Fidelis' historical mission, operations, and limited grant making to address health issues of the poor and underserved, and a summary of research and analysis on the rationale for the proposed purposes of the Foundation as to why health services and the key determinants of bad health for the underserved are intertwined and increasingly should be addressed together for impactful grant-making. Petition, ¶¶ 5, 24 through 36, and 150 through 156, Exs. 3, 35.

We were ultimately satisfied that the proposed purposes of the Foundation met the required criteria. We recognize that there were other paths that the Foundation might have taken with respect to its purposes and plans that might also have met those criteria, including those suggested by the commenters, had the board and membership proposed such comments in the Petition. However, the role of the Attorney General in review of a petition under N-PCL Section 511-a is to confirm the legal compliance of a proposed plan and not to mandate one plan over another.

(2) We received comment that the Foundation should prioritize funding certain program areas, in particular ensuring that all New Yorkers will continue to have access to high quality medical coverage and care and advocacy and policy work, particularly on the state level.

Attorney General Response: We recognize the importance of this transaction in increasing the available funding for, and partnering with, so many critical New York charitable organizations. Accordingly, we requested that Petitioner include disclosure and documentation of its planned grant making that is not typically included in a petition of this type. Petition, Ex. 45, Grant Program Guide. Petitioner did so, and we were ultimately satisfied that such materials met the criteria for our review. However, the role of the Attorney General in review of a petition under N-PCL Section 511-a is to confirm the legal compliance of a proposed plan and not to mandate one plan or program area over another.

(3) We received comment that the governance of the Foundation did not contain mandates for, or designated allocations for, Board members with expertise in the subject areas or communities that will be served. Several comments specifically requested that there be representation from a specific community or type of organization to be served by the Foundation, including plan members and community-based health clinics (FQHCs). We also received comments that the Board of the Foundation should reflect diverse interests and backgrounds more generally.

Attorney General Response: The board of a charitable corporation has a fiduciary duty of care that includes a duty to nominate board members with the appropriate diverse qualifications as “diversity will help insure a board committed to serve the organization’s mission with a range of appropriate skills and interests”. The Office of the Attorney General, *Right from the Start; Responsibilities of Directors of Not-for-Profit Corporations*, May 15, 2015, <https://www.charitiesnys.com/pdfs/Right-From-the-Start.pdf> page 6. The Petition evidences that the Petitioner evaluated the qualifications of the initial Foundation board members and establishes the Foundation’s general commitment to both diversity and community input. Petition, ¶¶ 156, 157, 171, Ex.39. Beyond such disclosures, the mandate of the Attorney General does not require that it involve itself in internal governance matters of the Foundation at this time, such as the selection of initial board and advisory committee members. Charitable corporations are generally required to post a public



list of their directors and officers in their Internal Revenue Service Information Return on Form 990, filed annually with the Charities Bureau, and available on the Charities Bureau Website, and to make the 990 available upon request. Fidelis has agreed to make these filings annually with the Charities Bureau. Petition, Ex. 53. Therefore, although the N-PCL has no specific diversity requirement or requirement that the governance of a charitable corporation include stakeholders as voting members of the board of directors, these documents will permit the public, charitable sector organizations, the media, charitable beneficiaries, and the Charities Bureau to raise issues of diversity and expertise with the governing body of the charity in the future.

(4) We received comment that because current Fidelis staff members may continue with Centene, it was not clear how such ties might affect what the Foundation can fund.

Attorney General Response: We were also concerned that the Foundation clearly explain its independent grant-making process and governance. Because Centene is a for-profit company, Centene itself would appear not to qualify for any grants from the Foundation pursuant to the grants guide which requires that grantees be only not-for-profit corporations with Tax Exemption from the Internal Revenue Service under Section 501(c)(3) of the Internal Revenue Code. Petition, Ex. 45, page 19. Second, Fidelis attaches the Foundation's conflict of interest policy to the Petition. Petition, Ex. 41. Third, the Petition states that it is not anticipated that any related party (as defined in N-PCL Section 102) of Fidelis or Centene will have any direct or indirect grantee, governance or financial relationship with the Foundation and that any related party transactions would be approved in accordance with the N-PCL and the conflict of interest policy; further that no present employee of Petitioner or Centene will be compensated as an employee, officer or director of the Foundation for a period of at least three years from the closing. Petition, ¶ 160.

(5) We received comment that there is a conflict of interest inherent in the appointment of board members to the Foundation from hospitals to which Centene will negotiate hospital reimbursement rates.

Attorney General Response: The Attorney General is always concerned about any potential conflict of interest in a transaction involving a charitable corporation. The Petition states Centene or its affiliates (as entities) will have no role in the governance or operations of the Foundation as the Foundation will be a New York charitable corporation with the

same Members as the Petitioner. Petition, 146 (organization structure of Petitioner and Foundation). See also this Attorney General Response, ¶ 11(5).

(6) We received comment that requested that the Foundation establish a Community Advisory Committee. Certain comments suggested that the role of the committee be advisory and serve as a community liaison and provide community assessments, while others suggested that the committee take on a more formal role of nominating directors to the board (and serve as a board training ground). Some comments suggested specific types of representatives or organizations that would be appropriate representatives for such a committee.

Attorney General Response: We were also concerned that the Foundation seek meaningful input from its stakeholders in its plan and future operations. Such outreach, although not required by N-PCL, is a meaningful practice for grant-making Foundations. The Petition states that “to assist the Foundation in developing and implementing its grant-making program, the Foundation plans to partner with health and social welfare experts to help identify funding priorities and grant initiatives. It will seek input from key stakeholders, including by establishing advisory committees to supplement the expertise on the Foundation Board. The committees may focus on urban, rural, immigrant health issues, or on particular health disparities on the board.” Petition, ¶ 171.

(7) We received comment stating that, in other health plan conversions, the new executives and directors of the health plan may receive stock options and large executive pay packages and a request that our office should make sure that no one receives inappropriate compensation for converting Fidelis Care to for-profit operation.

Attorney General Response: Based upon the Attorney General’s receipt of the above comment, the Attorney General sought from Fidelis and Centene further information related to the compensation arrangements of seven senior management employees at Fidelis (the “Fidelis Officers”). Following that inquiry, which included the production of additional documents and information from both Fidelis and Centene, Centene reported that the Fidelis Officers had entered into agreements with Centene that provided for, among other things, certain payments (the “Centene Bonuses”) subsequent to closing, in amounts substantially equivalent to the value of certain preexisting severance and retention payments that the Fidelis Officers would have received under their prior existing contractual agreements with Fidelis. Each of the Fidelis officers was required by Fidelis to waive payment of the severance and

retention payments from Fidelis at the time of the Agreement between Fidelis and Centene.

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| <b>10</b> | Objection Based on Concerns With Current Fidelis Operations  | <p>We received 3 comments based on concerns regarding Fidelis’ current operations and/or governance structure.</p> <p><u>Attorney General Response:</u> Fidelis is subject to oversight by the Attorney General’s Charities and Health Care Bureaus, and Medicaid Fraud Control Unit, as well as by the Department of Health and the Department of Financial Services. This oversight will continue when the Fidelis operations are transferred to Centene, and ongoing operational issues after the transfer may be evaluated by the independent consultant retained by Centene as required by the Attorney General.</p>  |
| <b>11</b> | Objection Based on Concern that There Should Be Legislation Specifically Covering Sales of Not-for-Profit Health Plans | <p>We received 10 comments based on concerns that New York would be better served by adopting a model state law governing conversions by and sales of substantially all assets of a nonprofit health plan or hospital, including because such law will ensure that the public has meaningful input prior to approval of the transaction.</p> <p><u>Attorney General Response:</u> The Attorney General’s mandate in reviewing the Petition emanates from the current N-PCL, which does not include such provisions.</p>  |
| <b>12</b> | Objection Based on Redaction of Appraisal of Fair Market Value of Petitioner’s Assets to Be Sold.                      | <p>We received 1 comment that the petition provided in the public notice was deficient because the petition contained a redacted version of the appraisal of the fair market value of Petitioner’s assets.</p> <p><u>Attorney General Response:</u> The Attorney General has discretion, under the Not-for-Profit Corporation Law, to accept a petitioner’s request that its materials in the Petition be treated as confidential because such materials contain trade secrets or confidential material. In reviewing the Petition, the Attorney General redacted certain sections that we believed were deserving of protection from disclosure at this time.</p> |