Steward Fallout Results in New Tools for Regulators in Massachusetts

Insights 02.14.25

PROFESSIONAL

DAVID S. SCHUMACHER
Partner
Boston

HEATHER M. ROMERO
Associate
Boston

The bankruptcy of Steward Health Care ("Steward") has resulted in calls for legislative action in Congress and various states. While the prospect of federal legislation seems remote, in Massachusetts, where Steward had a significant presence, Governor Maura Healey recently signed legislation directly addressing private equity involvement in health care. On January 8, 2025, Governor Healey signed into law The Act Enhancing the Market Review Process (the "Market Review Act"), which empowers state regulators to scrutinize health care transactions involving private equity firms and associated entities. These changes provide expanded tools for oversight and approval of transactions that could impact the control, ownership, or operations of healthcare entities by the Massachusetts Health Policy Commission ("HPC"), Center for Health Information Analysis ("CHIA"), and Office of the Attorney General's ("AG") ability to review such transactions. The new law will take effect in April 2025, 90 days after the bill was signed. Of particular note, the Market Review Act included a significant revision to the Massachusetts False Claims Act (the "MA FCA"). These changes aim to enhance accountability among healthcare investors, namely private equity investors, and ensure greater transparency in the management of healthcare entities.

The Market Review Act, including the MA FCA update, is viewed as a direct response to the recent collapse of Steward. Founded in 2010 by Cerberus Capital Management, Steward expanded rapidly, acquiring over 40 hospitals at its peak. However, its financial strategy, has been sharply criticized for prioritizing profits over patient care. Cerberus received a substantial amount of funds through a sale-leaseback arrangement involving Medical Properties Trust, which was primarily distributed as dividends to Cerberus's private investors. Cerberus exited its ownership of Steward Healthcare a few years later, in 2020.

The updates to the MA FCA include:

1. **Expanded Liability**: A new definition for potentially liable actors who hold an "ownership or investment interest" has been added, which encompasses direct or indirect possession of equity exceeding 10% in an entity, interests held by investors involved in capital raising, and interests held by investment pools, including those managed by private limited partnerships.
2. **60-Day Disclosure Requirement**: Investors falling under the new definition are now required to disclose any known violations of the MA

FCA within 60 days of identifying the violation or may themselves be liable for a violation of the MA FCA.

The Market Review Act also expands the state government's power to oversee and approve aspects of private equity companies' management of healthcare providers. Specifically:

1. **"Material Change" Expansion**: The new law increases the HPC's authority to review and propose modifications to "material change" transactions involving healthcare entities. Previously, The Act expands the definition of a reportable "material change" for healthcare providers and organizations. Under current law, Massachusetts healthcare providers and organizations with $25 million or more in net patient service revenue must notify the HPC, CHIA, and AG at least 60 days before certain transactions. This process, called a "Notice of Material Change" (MCN), may lead to a Cost of Market Impact Review (CMIR) if the HPC finds significant potential impacts on healthcare costs or competition. The new law the definition now includes transactions involving "significant equity investors" that result in a change of ownership or control. A significant equity investor is any private equity firm or entity holding over 10% equity in a provider or organization, excluding venture capital firms that only fund startups.
2. **Additional Disclosure Requirements**: As part of the MCN, HCP may request additional information from significant equity investors, such as financial statements and management structure.
3. **Delayed Transaction Closing**: The new law extends the potential delay for a transaction closing. Currently, a material change transaction may close 30 days after the HCP issues its final report in response to an MCN. However, under the new law, if the Massachusetts AG decides to challenge the transaction in court, the closing cannot occur before a final judgment is issued by the court.
4. **Post-Transaction Monitoring**: The new law enhances reporting requirements and scrutiny into investments by private equity firms by the HCP. Once the new law is in effect, HCP may ask that post-transaction information to be shared for up to five years after closing, to allow HCP to monitor potential post-transaction impacts.
5. **Limitations on Arrangements**: The new law also prohibits entering into certain new arrangements between management services organizations and healthcare providers; and
6. **Oversight of Real Estate Buy-Backs**: Finally, the new law imposes enhanced government oversight and approval over the real estate buy-back schemes.

Under the new law, private equity investors in Massachusetts health care facilities will be subject to significantly enhanced scrutiny in the Commonwealth. Moreover, the Massachusetts legislation reflects a marked trend towards increased scrutiny of private equity firms with health care holdings. The U.S. Department of Justice has announced that it would use the federal False Claims Act to investigate private equity firms that inappropriately influence health care decisions. Separately, in 2022, the Biden Administration released a fact sheet that referenced studies attributing poorer patient care and outcomes, yet increased government payor bills, associated with private equity owned SNFs, as compared to other ownership arrangements. And last year, Senators Elizabeth Warren and Ed Markey introduced The Corporate Crimes Against Health Care Act to address perceived exploitative practices by private equity firms in the healthcare sector. This proposed legislation would establish criminal penalties and civil liabilities for private equity firms or investment companies that take a controlling interest in healthcare organizations and contribute to events resulting in patient injury or death.

Healthcare providers, especially those under private equity ownership, should be aware of this heightened scrutiny on the healthcare industry. While it is premature to assess if the new Trump administration will adjust enforcement priorities associated with private equity in health care, there is every reason to think that enforcement efforts in certain states, such as Massachusetts, will continue. The Massachusetts Medicaid Fraud Unit has a reputation for aggressive enforcement of health care providers, and the amended MA FCA adds additional tools to its arsenal. Providers may consider the following:

- **Evaluate existing strategies.** Consider whether any existing strategies present enforcement liability, such as arrangements with competing medical providers or referral sources. Pay close attention to growth strategies that may have been established or changed after a change in ownership for potential risk.
- **Analyze data provided to government payors.** Healthcare regulators are increasingly using data analytics to identify providers to target for enforcement investigations. Reviewing billing patterns, especially around periods of

increased revenue, may illuminate potential areas of investigation for government regulators and inform proactive responses.

- **Enhance internal compliance.** Review and revise compliance policies and procedures as needed to tighten practices that are often scrutinized by government regulators (for instance, interactions with referral sources). Provide periodic new and refresher trainings to employees.

RELATED CAPABILITIES

False Claims Act

Health Care Financial Restructuring

Business Transactions

Mergers and Acquisitions

Real Estate

Skilled Nursing Facilities (SNFs) and Long-Term Care Providers