AB 1415: New California Bill Proposes to Expand OHCA Health Care Pre-Transaction Notice Requirements to Management Services Organizations and Private Equity Groups

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PROFESSIONAL

California Assemblymember Bonta, chair of the Assembly Committee on Health, has introduced a new bill that would require parties to notify the Office of Health Care Affordability ("OHCA") at least 90 days before the anticipated closing date of certain health care transactions involving (1) management services organizations ("MSOs"), (2) private equity groups, (3) hedge funds, (4) health systems, or (5) entities that own or otherwise control a health care entity.

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Background

First established in 2022 under the California Health Care Quality and Affordability Act, OHCA is a relatively new state agency, formed, in part, to review and evaluate certain transactions involving health care service plans, hospitals, physician organizations, and other health care entities, and the impact of the transaction on consolidation, market power, and other market failures in the health care industry.

OHCA's pre-transaction notice requirements presently apply to certain "health care entities" (payers and related entities, providers, fully integrated delivery systems and pharmacy benefit managers) that: (1) meet certain asset or revenue thresholds or are located in a primary care shortage area; and (2) engage in a "material change transaction" as defined in the regulations. These submitting health care entities are required to notify OHCA of the transaction no less than 90 days before it closes. If OHCA determines that the transaction is likely to have a significant impact on market competition, costs for purchasers and consumers, or on California's ability to meet cost targets, it may determine that a "cost and market impact review" is warranted. Should that occur, the closing could be delayed for months while OHCA conducts its review, solicits comments to its preliminary report, and then finalizes its review. Transactions subject to that review are not permitted to close until 60 days after OHCA issues its final report. So, although OHCA does not have authority to *prohibit* a transaction, it can significantly *delay* a transaction and refer it to the Attorney General for further review. Read more about the existing OHCA pre-transaction notice requirements in our prior client alerts here and here.

Currently, OHCA's pre-transaction notice requirements do not expressly apply to transactions involving MSOs, private equity groups, or hedge funds. The requirements can indirectly apply to such entities to the extent they transact with health care entities, however, and such health care entities are required to provide notice to OHCA of a given transaction.

California lawmakers passed a bill last year, AB 3129, that would have imposed Attorney General notice and consent requirements on private equity groups and hedge funds entering into certain health care transactions. But Governor Newsom vetoed the bill, explaining that by subjecting health care transactions involving private equity groups or hedge funds to review by the Attorney General, AB 3129 would exempt those transactions from OHCA's existing review. From the Governor's perspective, "OHCA was created as the responsible state entity to review proposed health care transactions, and it would be more appropriate for the OHCA to oversee these consolidation issues as it is already doing much of this work." Notably, Governor Newsom did not voice opposition to the general idea of subjecting private equity and hedge fund health

care transactions to government review. He simply argued that OHCA was the state entity better situated to conduct such a review.

OHCA Review of Health Care Transactions Involving Private Equity, Hedge Funds, and "NewCos"

Perhaps taking a cue from the Governor, AB 1415 differs from last year's AB 3129 by making OHCA the state entity responsible for overseeing private equity and hedge fund health care transactions. AB 1415 would require a private equity group, hedge fund, or "any newly created business entity created for the purpose of entering into agreements or transactions with a health care entity" (commonly referred to as "NewCos") to file a pre-transaction notice with OHCA regarding certain material change transactions between such entity and (A) a "health care entity", or (B) an entity that owns or controls the "health care entity." Although it's unclear how the current OHCA regulations would be modified to account for such a change, private equity groups, hedge funds, and NewCos would likely shoulder more rigorous information disclosure requirements under AB 1415 because they could themselves be submitting entities.

SB 351 Proposes Additional Restrictions on Private Equity and Hedge Fund Control Over Health Care Providers : California lawmakers have also introduced a different bill, SB 351, that would impose limitations on private equity groups and hedge funds managing California physician or dental practices. The bill shares many similarities with a portion of last year's AB 3129. More detail about SB 351 can be found in this HLB client alert.

OHCA Review of Health Care Transactions Involving MSOs

By expanding the definition of "health care entity" to include MSOs, AB 1415 would widen the potential universe of submitters subject to the OHCA pre-transaction notice requirements; this could potentially trigger material change transaction notices where one would otherwise not be required under current laws and regulations. The bill defines an MSO broadly as "an entity that provides administrative services or support for a provider, not including the direct provision of health care services." It defines "administrative services or support" as including, without limitation, utilization management, billing and collections, customer service, provider rate negotiation, and network development.

This one definitional change creates a host of questions and complications. For one, the current OHCA pre-transaction notice regulations do not neatly fit with an expanded definition of "health care entity" that includes MSOs (*e.g.*, the regulations have thresholds based on revenue from health care services, but many MSOs do not have revenue from "health care services" as defined by the regulations). For another, AB 1415's broad definition of MSOs would capture a vast array of companies that would not typically be considered an MSO. For example, the broad definition of MSO means that OHCA's transaction review authority could encompass billing and collections companies, revenue cycle management consultants, telehealth companies, and marketing firms.

OHCA Review of Health Care Transactions Involving Health Systems and Parent Companies of Health Care Entities

AB 1415 makes another definitional change by including a "health system" as a "provider." The bill defines a "health system" as any of the following entities, "under common ownership or control, in whole or in part":

1. A hospital system, as defined in Health and Safety Code § 127371(e);
2. A combination of one or more hospitals and one or more physician organizations; or
3. A combination of one or more hospitals, one or more physician organizations, or one or more health care service plans or health insurers.

AB 1415 also adds to the definition of a "provider" any parent company of a provider, defined to include "an entity that owns, operates, or controls" an "entity" that otherwise meets the definition of a provider, "regardless of whether it is currently operating, providing health care services, or has a pending or suspended license." [1]

Although hospital systems, hospitals, and physician organizations (with 25 or more physicians) are already considered "health care entities" under the current OHCA regulations, AB 1415's changes seem designed to impose greater information

disclosure requirements on integrated or affiliated health care entities and their parent companies. For example, if an entire hospital system constitutes a single "health care entity" as proposed by AB 1415, the hospital system would more easily meet the current regulations' asset thresholds used to determine whether a health care entity is a submitter. It likely also means that "health systems" would need to provide information about all of their constituent entities, even if those entities are not part of the material change transaction at issue.

Why It Matters

The OHCA pre-transaction notice and cost and market impact review processes have added layers of complexity and delayed many health care transactions in California. By extending this requirement for OHCA review to health care transactions involving MSOs, private equity, hedge funds, health systems, or parent companies of health care entities, AB 1415, if signed into law, would expand OHCA's impact on California businesses. These additional costs and regulatory burdens could create a chilling effect on California health care transactions.

What's Next?

California bills are not heard in a policy committee until 30 days after they have been introduced. Since AB 1415 was introduced on February 21, it could be heard by the Assembly Health Committee as early as March 23, 2024. Given the complexities and questions raised by AB 1415's initial language, and the legislative histories of the current OHCA pre-transaction requirements and last year's failed AB 3129, AB 1415 will likely undergo significant changes as it makes its way through the legislative process. Hooper, Lundy, & Bookman will closely track AB 1415's development and provide timely updates and guidance.

[1] This addition to the "provider" definition is puzzling because although it refers to an entity that owns, operates, or controls an "entity" identified in the other paragraphs of the "provider" definition, those referenced paragraphs do not always reference an entity (*e.g.*, a "health facility" is a physical facility and not a distinct legal entity).

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