New California Bill To Expand Oversight Over Private Healthcare Deals

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PATIENT CARE

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California is progressing toward passing a bill to expand its oversight and control over healthcare transactions involving private equity groups or hedge funds. The bill, which would cover transactions entered into on or after January 1, 2025, would require the state Attorney General to preapprove certain transactions and would prohibit private equity group or hedge fund control over physician or psychiatric practices. It would also prohibit certain common economic relationships of private equity groups and hedge funds with physician or psychiatric practices. The bill reflects California's increasing efforts to oversee and regulate healthcare transactions, adding to the onslaught of state legislation intended to regulate the healthcare industry, some of which now face Constitutional challenges.

On February 16, 2024, California Attorney General Rob Bonta and Assembly Speaker pro tempore Jim Wood introduced AB 3129, which would continue the trend of states seeking to expand oversight over transactions involving healthcare providers and entities. The bill was passed by the California Assembly on May 22, 2024 with slight amendments.

For transactions entered into on or after January 1, 2025, AB 3129 would require at least a 90-day notice and Attorney General approval of changes of control and acquisitions of healthcare facilities and provider groups by private equity groups or hedge funds. The bill would allow the Attorney General, as part of such consent process, to consent, give conditional consent, or not consent to the transaction if it "may have a substantial likelihood of anticompetitive effects or may create a significant effect on the access or availability of health care services to the affected community." In making that determination, the Attorney General would apply a "public interest" standard, defined in terms of "the interests of the public in protecting competitive and accessible health care markets for prices, quality, choice, accessibility, and availability of all health care services for local communities, regions, or the state as a whole."

The proposed legislation also would prohibit private equity groups or hedge funds from controlling or directing certain aspects of physician or psychiatric practices and prohibit entities directly or indirectly controlled by a private equity group or hedge fund from managing physician or psychiatric practices for certain fees. Examples of conduct that would be prohibited include contracting on behalf of, rate setting for, or influencing admission, referral, or availability policies of physician or psychiatric practices. The bill

explicitly notes that revenue sharing is not prohibited, although other restrictions could potentially apply to such arrangements. These prohibitions would potentially be effective upon enactment.

As passed by the California Assembly on May 22, 2024, AB 3129 proposes definitions for certain key terms, including the following:

- "Hedge fund": "a pool of funds managed by investors for the purpose of earning a return on those funds, regardless of the strategies used to manage the funds. Hedge funds include, but are not limited to, a pool of funds managed or controlled by private limited partnerships." The definition does not include hedge fund contributors who "otherwise do not participate in the management of the hedge fund or the fund's assets, or in any change in control of the hedge fund or the fund's assets."
- "Private equity group": "an investor or group of investors who engage in the raising or returning of capital and who invests, develops, or disposes of specified assets" and does not include group contributors who "otherwise do not participate in the management of the private equity group, or in any change in control of the private equity group or the group's assets."
- "Health care facility": "a facility, nonprofit or for-profit corporation, institution, clinic, place, or building where health-related physician, surgery, or laboratory services are provided, including, but not limited to, a hospital, clinic, long-term health care facility, ambulatory surgery center, treatment center, or laboratory or physician office located outside of a hospital."
- "Licensed health professional": "includes all of the following: (A) Physicians and surgeons. (B) Dentists. (C) Optometrists. (D) Pharmacists. (E) Nonphysician mental health professionals, including, but not limited to, psychologists, licensed clinical social workers, and marriage, family, and child counselors. (F) Physician assistants or advanced practice registered nurses, including, but not limited to, nurse practitioners, certified nurse-midwives, and clinical nurse specialists."
- "Provider": "means a group of two to nine licensed health professionals acting within their scope of practice, except for a provider group."
- "Provider group": "means a group of 10 or more licensed health professionals acting within the scope of their practice, or a group of two to nine licensed health professionals acting within the scope of their practice that generated annual revenue of ten million ($10,000,000) or more. A provider group may include any combination of licensed health professionals."

The notice and consent provisions of the bill would apply to the following transactions:

1. direct and indirect purchases of a material amount of assets and operations of a healthcare facility or provider;
2. changes in voting control of a healthcare facility or provider; or
3. direct and indirect changes in control over the healthcare services or operations of a healthcare facility or provider.

Importantly, only written notice would be required for transactions involving nonphysician providers with an annual revenue of more than $4 million or physician providers with an annual revenue between $4 million and $10 million — Attorney General consent would be not required. The Attorney General could also grant a waiver request under certain conditions (such as financial distress or showing that the transaction would ensure continued healthcare access), and transactions involving physician or nonphysician providers with annual revenue of less than $4 million are wholly exempt.

Where applicable, the written notice must be provided to the Attorney General at the same time that any other state or federal agency is notified of the transaction and otherwise at least 90 days before the change occurs. The Attorney General may grant, deny, or impose conditions on the transaction within 90 days of the notice and may extend this time period where there is a need for additional review or if review is pending by another state or federal agency.

As of the writing of this article, the California Assembly passed AB 3129 by a vote of 50-16, mostly along party lines. The bill has been sent to the California Senate for further consideration. If enacted, the bill could pose significant limitations, delays, or uncertainties on financial sponsors and their portfolio companies on their acquisition or divestiture of provider practices as well as common control and economic arrangements with their current or future investments.

California is not alone in its efforts to increase regulation of healthcare transactions. Other states that have enacted healthcare transaction review laws include Connecticut, Illinois, Indiana, Massachusetts, Minnesota, Nevada, New York, and Oregon, many of which are based on the Model Act from the National Academy for State Health Policy. Not all recent state efforts have been successful, however. Similar bills have failed in Florida, Maine, and North Carolina, and even some of the enacted laws (and related efforts to regulate the industry) now face Constitutional challenges.

For example, the Oregon Association of Hospitals and Health Systems has filed in federal court a facial constitutional challenge to Oregon's Health Care Market Oversight Program (HB 2362), which allows the Oregon Health Authority to review certain material healthcare transactions. The challenge asserts, among other things, that the standards for review are unconstitutionally vague in violation of Due Process. While that case remains pending, plaintiffs in another Oregon lawsuit recently prevailed in a challenge to Oregon's Prescription Price Transparency Act (ORS 646A.689), which included reporting requirement provisions that allowed the state to publish manufacturers' trade secrets if the "public interest" requires such publication.

These cases indicate that we can expect to see additional legal challenges to other state health care transaction review laws and related attempts to increase regulation and oversight over the healthcare industry.

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