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Spurred on by the Steward Health Care Bankruptcy, Massachusetts Adopts Bill Regulating Private Equity and REITs in Health Care, Continuing a National Trend

Health Care Law Brief on **January 31, 2025**

On January 8, 2025, Massachusetts Governor Maura Healey signed into law House Bill 5159 (the "Bill"). The Bill grants the state new regulatory powers to oversee and review health care transactions involving private equity firms, real estate investment trusts ("REITs"), and management services organizations ("MSOs"). The Bill is the tenth law enacted in recent years to scrutinize health care transactions, and its enactment in Massachusetts highlights the continued expansion of state oversight of health care transactions.

Key Provisions

- **Expanded Definition of "Material Change Transaction" That Requires Reporting**: As further described below, the Bill broadens the scope of what constitutes a material change transaction to include transactions involving private equity firms, REITs, and MSOs, such as changes in ownership, significant asset transfers, and conversions of nonprofit organizations to for-profit entities.[1]
- **Additional Annual Reporting Requirements**: For providers and facilities that have existing annual reporting obligations to the Center for Health Information and Analysis ("CHIA"), the Bill expands the reporting obligation to require detailed disclosures on ownership structures and finances, including information involving parent entities and affiliates.[2]
- **Penalties for Non-Compliance**: The Bill increases penalties for entities that fail to comply with reporting obligations to up to $25,000 per week.[3]
- **Post-Closing Oversight by the Health Policy Commission ("HPC")**: The Bill grants HPC authority to assess the impact of "significant equity investors" on health care costs, and such oversight may be exercised up to five years post-closing of a transaction.[4]

- **Massachusetts False Claims Act Liability for Investors**: The Bill expands the definition of "knowledge" under the Massachusetts False Claims Act, expanding potential liability to entities with an "ownership or investment interest" (defined below) that are aware of a False Claims Act violation but fail to disclose such violation within 60 days.[5] The expanded definition is presumably intended to target sponsors and investors, who, through transaction-related diligence activities or post-closing operational involvement, learn of potential violations of the state's False Claims Act. **Sponsors and investors with substantial exposure to businesses with Medicaid revenue should discuss the impacts of this theory of liability with regulatory and deal counsel.**

- **Expanded Attorney General Involvement**: The Bill grants the Attorney General with expanded powers to intervene in HPC hearings, and empowers the Attorney General to compel entities to produce documents or provide testimony under oath with respect to information submitted to CHIA.[6]

- **Prospective Prohibition on Hospital-REIT Sale-Leaseback Arrangements**: Under the Bill, the state will *not* issue an acute-care hospital license to any facility "if the main campus of the acute-care hospital is leased" from a REIT.[7] Relationships in effect before April 1, 2024 will be grandfathered and such grandfathered status will be transferrable in a change of ownership.

History and Regulatory Backdrop

History of Regulation of Health Care Facilities

Although the Bill is among the most comprehensive and far-reaching in the nation, it is not without precedent. As described by Proskauer in a number of recent alerts, publications, and presentations (including for the American Health Law Association and the New York State Bar Association), elected officials in a number of states have reacted to the decade-old surge in investment in the health care sector with measures that are intended to scrutinize and increase transparency over such transactions.

In addition, transaction review laws build upon existing, and sometimes controversial, regulatory review mechanisms that impact the health care industry, particularly "Certificate of Need" ("CON") laws. By way of background, and as a result of now-defunct federal requirements, states in the 1970s adopted CON laws, a form of economic planning intended to avoid over-supply.[8] State CON laws, many of which remain in effect,[9] regulate health care facilities (e.g., hospitals and ASCs) and typically impose approval or reporting requirements over certain transactions, such as facility renovations, expansions or mergers, or the purchase of complex medical equipment (e.g., CT or MRI).

Despite this backdrop of substantial regulation affecting health care facilities, many states have historically had limited to no regulatory review authority over transactions affected physicians and physician practices. In light of existing regulatory oversight affecting facilities, state legislators may view health care transaction laws as incremental expansions over state regulatory powers. In contrast, investors and their stakeholders are likely to view these laws as material expansions, given that there was historically limited regulatory oversight for these transactions.

The Impact of the Steward Health Care Bankruptcy

The Bill should be viewed as a reaction by Massachusetts elected officials to the bankruptcy of Steward Health Care. The bankruptcy, which was widely reported on and resulted in a number of federal and state-level legislative hearings, impacted Massachusetts residents, in particular, and resulted in the Massachusetts Department of Public Health establishing a call center dedicated to answering public questions regarding the bankruptcy.

As summarized by the Massachusetts Senate in the *first* sentence of a press release concerning the Bill, the "Bill helps close gaps that caused the Steward Health Care collapse."[10]

Expanded Definition of Material Change Transactions

Under existing Massachusetts law, health care providers and organizations with annual net patient service revenue exceeding $25 million are required to submit a Material Change Notice ("MCN") to HPC, CHIA, and the Office of the Attorney General at least 60 days prior to a proposed material change.

The Bill broadens the scope of what constitutes a material change that requires the submission of an MCN to include the following:[11]

- Transactions involving a "Significant Equity Investor" that result in a change of ownership or control of a provider or provider organization. The term "Significant Equity Investor" (which is excerpted, in its entirety, at the end of this post) is defined to include any private equity firm with a financial interest in a provider, provider organization, or MSO, as well as any investor or group holding 10% or more ownership in such entities.
- "Significant acquisitions, sales, or transfers of assets, including, but not limited to, real estate sale-leaseback arrangements."
- "Significant expansions in a provider or provider organization's capacity."
- Conversion of nonprofit providers or organizations to for-profit entities.
- Mergers or acquisitions leading to a provider organization "attaining a dominant market share in a particular service or region."

Of note, some of new categories, such as "significant expansion" in "capacity", are ambiguous and do not adopt firm reporting threshold or parameters, which we expect are likely to be addressed via further rule-making or guidance.

Implications for Private Equity Investors and REITs

The Bill represents a significant shift in the regulatory landscape for private equity investors and REITs in Massachusetts, and the Bill makes Massachusetts an outlier among the states with respect to the obligations and duties imposed upon investors and REITs.

Notwithstanding the foregoing, the Bill's requirements represent a significant evolution, the product of ongoing legislative compromise. When introduced in the Massachusetts Senate as Senate Bill 2871 in 2024, the Bill's precursor included additional statutory restrictions related to the corporate practice of medicine and "Friendly PC" model, maximum debt-to-EBITDA requirements for transactions involving providers or provider organizations, and bond requirements for private equity investors.

Stakeholders are advised to closely monitor further guidance and regulations that may be issued by Massachusetts authorities, and should continue to follow Proskauer's Health Care Law Brief for continuing developments in this space.

Relevant Definitions

- "**Health care real estate investment trust**" means a real estate investment trust, as defined by 26 U.S.C. section 856, whose assets consist of real property held in connection with the use or operations of a provider or provider organization.
- "**Non-hospital provider organization**" means a provider organization required to register under section 11 of the Bill that is: (i) a non-hospital-based physician practice with not less than $500,000,000 in annual gross patient service revenue; (ii) a clinical laboratory; (iii) an imaging facility; or (iv) a network of affiliated urgent care centers.
- "**Private equity company**" means any company that collects capital investments from individuals or entities and purchases, as a parent company or through another entity that the company completely or partially owns or controls, a direct or indirect ownership share of a provider, provider organization, or management services organization; provided, however, that "private equity company" shall not include venture capital firms exclusively funding startups or other early-stage businesses.
- "**Significant equity investor**" means (i) any private equity company with a financial interest in a provider, provider organization, or management services organization; or (ii) an investor, group of investors, or other entity with a direct or indirect possession of equity in the capital, stock, or profits totaling more than 10% of a provider, provider organization, or management services organization; provided, however, that "significant equity investor" shall not include venture capital firms exclusively funding startups or other early-stage businesses.
- "**Ownership or investment interest**" means any: (1) direct or indirect possession of equity in the capital, stock, or profits totaling more than 10% of an entity; (2) interest held by an investor or group of investors who engages in the raising or returning of capital, and who invests, develops, or disposes of specified assets; or (3) interest held by a pool of funds by investors, including a pool of funds managed or controlled by private limited partnerships, if those investors or the management of that pool or private limited partnership employ investment strategies of any kind to earn a return on that pool of funds.

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[1] Bill, Section 24.

[2] Bill, Section 42.

[3] Bill, Section 43.

[4] Bill, Section 24.

[5] Bill, Section 29.

[6] Bill, Section 49.

[7] Bill, Section 64

[8] *See* National Health Planning and Resources Development Act of 1974 (P.L. 93-641).

[9] *See, e.g.,* National Conference of State Legislatures, Certificate of Need State Laws, available at: https://www.ncsl.org/health/certificate-of-need-state-laws.

[10] Commonwealth of Massachusetts, Senate Press Room, *Legislature Passes Major Health Care Oversight Legislation, Regulates Private Equity* (Dec. 30, 2024), available at: https://malegislature.gov/PressRoom/Detail?pressReleaseId=164.

[11] *See* Bill, Section 24.

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