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Private Equity: Proposed Health Over Wealth Act – What This Means for You

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On April 3, 2024, Senators Edward Markey (D-Mass.) and Elizabeth Warren (D-Mass.), chaired a Senate Health, Education, Labor, and Pensions (HELP) Subcommittee on Primary Health and Retirement Security field hearing titled, *When Health Care Becomes Wealth Care: How Corporate Greed Puts Patient Care and Health Workers at Risk*. As part of the hearing process, Senator Markey released his new legislative agenda that calls for transparency and accountability for private equity (PE) in health care.

This hearing is the last in a line of Federal and state governmental inquiries into for-profit health care and attempts to regulate private equity investment in physician practices, hospitals, ambulatory surgery centers, hospice providers and long-term care facilities, among others. Recently, the U.S. Federal Trade Commission (FTC) and U.S. Department of Justice (DOJ) held a joint virtual workshop styled *Private Capital, Public Impact: An FTC Workshop on Private Equity in Health Care*, aimed at examining the role of private equity investment in health care markets. This workshop was coupled with a Request for Information (RFI) issued by the FTC, DOJ and United States Department of Health & Human Services (HHS) requesting public comment on deals conducted by health systems, private payers, private equity funds, and other alternative asset managers that involve health care providers, facilities, or ancillary products or services. The RFI also requests information on transactions that would not be reported to DOJ or FTC for antitrust review under the Hart-Scott-Rodino Antitrust Improvements Act (HSR). In addition, the states of California, Minnesota, Oregon and others have either enacted laws or have proposed legislation aimed at regulating or eliminating private equity investment in health care providers in those states.

The Markey Bill is called the "Health Over Wealth Act" and has a number of provisions aimed at corporate transparency, government oversight and regulation of for-profit investment in health care. Specifically:

Reporting

The bill would require PE-backed or other for-profit owned providers (those providing services covered by Medicare under 42 U.S.C. Section 1395d) such as hospitals, hospice, nursing homes, and certain other facilities[1], to annually report to HHS on all manner of things including, but not limited to (a) debt; (b) fees collected by the PE firm; (c) dividends paid by the health care entity to the

PE fund; (d) lobbying or political spending by the PE fund and health care entity; (e) sale leaseback agreements; (f) real estate, mortgage, and lease payments; (g) interest paid on lines of credit; (h) transactions with vendors or service providers; (i) staffing, disaggregated by position and ratio of staff to patients and number of job postings and vacancy rates by position; (j) number of beds in use and capacity (for hospitals); and (k) number of health care facilities or providers owned by the PE firm that have closed in the previous year.

Focusing on recently reported examples of financially troubled private equity backed companies, Federal legislators and regulators have increasingly expressed concern that PE investors and other for-profit operators of health care companies strip their investments down to bare bones, recapitalize them with debt and make distributions to themselves and other investors with the proceeds of the indebtedness, pay themselves handsome management fees and engage in expensive real estate sale-leaseback transactions. These practices, they argue, are designed to enrich the owners of these organizations at the expense of patient care and safety and the livelihoods of health care workers. They also have expressed concern over creeping acquisitions that escape HSR reporting but grow to a size, and market power, which threaten competition if left unchecked.

Accountability

The Markey bill also would require HHS to establish mechanisms to “mitigate the risks related to for profit ownership of health care entities” including requirements to:

1. Establish escrow accounts to cover operating and capital expenditures for five years in case of a closure or reductions of essential health care services. The account should include enough funds to pay out contract obligations to health care providers and other staff and to supply supplemental funding to community health care or non-profit providers in the surrounding geographical areas affected by such closures or service reductions.
2. Require minimum investments in capital in any health care entity purchased; or
3. Supply financial contributions sufficient to mitigate the impact of potential closure, reduction of essential health services, workforce understaffing, or reduction in quality or safety of care or health care access.

Approvals and Licensure

The bill would require any health care entity looking to enter into an agreement to sell to, or lease from, a real estate investment trust must submit the sale or lease to HHS for review. HHS could block any agreement that would lead to a long-term weakened financial status of the health care entity or place the public health at risk.

The bill also would require that PE firms to obtain a “license” in order to invest, directly or indirectly, in a health care entity. If a firm does not follow the provisions of this bill or engages in price gouging, understaffing, access barriers, or other metrics as found appropriate by HHS, HHS may revoke the license, requiring divestiture from health care entities in which the firm already invests.

Task Force

The bill would set up a task force chaired by HHS to monitor changes in the health care marketplace; address and limit the role of private equity and consolidation in health care; and identify and address PE or market consolidation patterns. In addition, the bill would allow HHS to prohibit a PE fund from

purchasing voting securities of a health care entity and prohibit any merger or acquisition that would result in a PE fund gaining control of voting securities of a covered firm until the task force has had sufficient time to study and identify whether abuses are taking place in specific health care sectors or by health care entities related to price gouging, understaffing, access barriers, regulation compliance violations, or such other metrics as the Secretary may determinate appropriate.

Closures

The Markey Bill would require public notification and community input prior to hospital closures or service reductions. Hospitals that receive Medicare payments would be required to notify the Secretary of HHS at least 180 days prior to the discontinuation of services or a full hospital closure to allow HHS to determine whether the stated discontinuation or closure would negatively impact access to essential services and require the hospital to submit a mitigation plan to preserve access to essential services for the community via partnerships with surrounding facilities, including patient transportation plans, and a plan to support the transition of health care employees to other positions. The bill also provides that there shall be a public comment period about the mitigation plan.

Tax Treatment of Real Estate Investment Trusts

It is a common practice among PE backed entities to liquidate their real estate investments to raise additional cash. The bill as proposed would have provisions to discourage sales of health care property that would undermine the long-term financial stability of a health care entity for short term profit by closing, so called “tax loopholes” for real estate investment trusts for rental income from health care properties.

Summary

It is unclear if this legislation “has legs” but it is the most detailed proposals to date in furtherance of Washington’s concerns and disdain with respect to PE investment in health care. The bill is also consistent with the various thoughts we’ve seen percolating in Washington and in various states across the country. Investors are well advised to at least understand the thinking that has led to the point and consider addressing with their elected representatives how they might navigate the increasingly choppy waters.

[1] This bill does not address physician practice entities as physicians do not provide Medicare services under 42 U.S.C. Section 1395d.

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