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Bill Advances in California Assembly Giving California Attorney General Broad Review Authority for Health Care Transactions

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The "Health Care Consolidation and Contracting Fairness Act of 2022" (the "Bill" or "AB-2080"), has advanced out of the Committees on Health and Judiciary.

This Bill has the potential to significantly reshape and restrict the landscape of health care transactions in California. Effective January 1, 2023, California medical groups, for-profit hospitals, health systems, health care service plans, health insurers, skilled nursing facilities, and pharmacy benefit managers pursuing transactions valued at $15 million or more must provide at least 90 days' advance notice to the California Attorney General (the "AG"), which notice will be made publicly available. If the AG determines the deal is a "major transaction" (as described below), public hearings must be held, and the AG may retain outside experts at the applicant's expense. The AG has up to 135 days to review each such transaction and, ultimately, has discretion to reject the deal or to give consent, which consent may (and most likely will) come with conditions.

This Alert summarizes the key elements of the Bill, as well as implications if the Bill were to become law. Parties contemplating California health care transactions should monitor the Bill closely and consider the effect AB-2080 may have on transaction timelines beginning in 2022.

I. The Bill

On February 14, 2022, California State Assembly member Jim Wood introduced AB-2080.[1] The Bill, if adopted in its current form, will go into effect on January 1, 2023. The Bill (i) requires notice to and consent by the AG for certain health care transactions valued at $15 million or more, (ii) restricts the ability of payors and providers to use contractual provisions that tend to reduce market competition or limit a patient's choice of provider, and (iii) expands the transactional review authority of the AG and the Department of Managed Health Care (the "DMHC") with respect to health care transactions between a health care service plan or health insurer and a health care provider or health facility.

Increased California AG Oversight

First, the Bill would prohibit a variety of health care entities, other than non-profit health care facilities already subject to AG approval,[2] from entering into an agreement or undertaking a transaction involving an asset sale or disposition or change of control (including changes in management or governance) valued at $15 million or more without providing 90 days' prior written notice to the AG and obtaining the AG's written consent, subject to limited exceptions.[3]

Notice to the AG is due 90 days prior to entering in such an agreement or transaction, or at such earlier time as notice is given to any other state or federal agency. The notice will be made available to the public in written form, and any other supporting materials provided to the AG may also be made public. The AG must notify the health care entity of a decision within 90 days, although the Bill allows the AG may extend this period once by 45 days if certain circumstances apply, such as where an extension is necessary to obtain additional information or where a proposed agreement is substantially modified after the original notice was given.

The AG has the discretion to give consent, to give conditional consent, or not to give consent to the agreement or transaction. In making that determination, the AG may consider any factors it deems relevant, including whether the proposed material change (i) may have a significant impact on market competition or costs for payers, purchasers, or consumers; (ii) may improve the quality of care, such as the ability to offer culturally competent and appropriate care;

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(iii) may have a significant impact on the access to or availability of health care for payers, purchasers, or consumers; (iv) is in the public interest; and (v) is likely to maintain access to care in a rural community.

Additionally, the AG must determine for each deal whether it constitutes a "major transaction." For hospitals and hospital systems, a major transaction is one that would otherwise be subject to AG review if it involved a nonprofit corporation. For health care service plans, health insurers, and pharmacy benefit managers, a major transaction is one that (i) affects a significant number of enrollees; (ii) involves a material amount of assets; *or* (iii) adversely affects either the subscribers or enrollees or the stability of the health care delivery system because of the entity's market position, including, but not limited to, the entity's market exit from a market segment or the entity's dominance of a market segment.[5] For medical groups, the AG is tasked with defining "major transaction" via regulation. It is unclear when further guidance for medical groups will be available.

Before issuing a decision on a major transaction, the AG is required to conduct public meetings to discuss potential impact.[6] If the transaction involves a medical group or a hospital or hospital system, one of the public meetings must be held in the county in which the medical group or hospital is located, in order to hear comments from interested parties. At least 14 days before conducting the public meeting, the AG must provide written notice of the time and place of the meeting through publication in the newspapers of general circulation in the affected community and to the boards of supervisors of the counties in which the entity is located. The AG may also contract for assistance in reviewing a proposed material change and monitoring ongoing compliance with the terms of a material change.

The entity seeking the AG's consent must, upon request, pay the AG for all costs incurred in making determinations related to the transaction, including administrative costs. The AG is also entitled to reimbursement, by the party with the burden of compliance, for all costs incurred in monitoring ongoing compliance with the terms and conditions of the sale or transfer of assets, including contract and administrative costs.

In the case of an unfavorable AG decision, the Bill permits health care entities to appeal within 30 days by requesting administrative adjudication. Given the broad discretion given to the AG, however, challenging a decision may be difficult.

Restrictions to Contractual Provisions

Second, the Bill would restrict the ability of payors and providers to use contractual provisions that tend to reduce market competition or limit a patient's choice of provider. Assemblymember Wood has said the Bill targets certain contracting practices believed to restrict competition, such as the sort of "all or nothing" contract term targeted by the AG in its recent $575 million settlement with a California health system.[7] While existing law regulates health care contracts, including requirements for reimbursement and the cost-sharing amount collected from an enrollee or insured, this Bill would prohibit a contract from containing terms that (i) restrict a health plan or insurer from steering an enrollee or insured to another provider or facility, or (ii) require the health plan or insurer to contract with other affiliated providers or facilities. Further, the Bill would authorize the appropriate regulating department to refer a health plan's or insurer's contract to the AG and would authorize the entity charged with reviewing health care market competition to review a health care practitioner's, or health facility's, entrance into a contract that contains specified terms. The Bill would also authorize the AG, and any other entity charged with reviewing health care market competition, to adopt any regulations to implement this provision, and would entitled them to specific performance, injunctive relief, and any other equitable remedies a court deems appropriate.

Increased Department of Managed Health Care Authority

Third, the Bill would expand the existing DMHC review authority over health care plan transactions to include any acquisition by a plan of another entity. Currently, DMHC approval is required only for acquisitions of health plans, but

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not acquisitions of other entities by health plans.[8] The Bill would authorize the DMHC Director to disapprove an agreement if it would substantially lessen competition in the health system or among a particular category of health care providers.

II. Strategic Implications

Previous Iteration of the Bill

For years, proponents of increased AG health care transactional review have introduced similar legislation. However, while some of the proposed legislation have progressed far into the legislative process, all proposals ultimately failed, due in part to stiff industry opposition. An example of such legacy legislation is SB-977, introduced in the 2019-2020 legislative session.[9] Health care entities were particularly concerned by the substantial amount of power over healthcare transactions that SB-977 would have given to the AG. SB-977 was strongly opposed by a large number of hospitals, physician groups, and organizations, including the California Hospital Association ("CHA"), the California Medical Association ("CMA"), and the American Investment Council. CHA's Chief Executive expressed that the SB-977 was a dangerous measure and CMA stated that the overbroad proposal could force smaller practices out of business.[10] CHA, along with a coalition comprised of various health care entities, has expressed similar concerns for this Bill and published a letter of opposition noting, "AB-2080 gives so much arbitrary and absolute discretion to the [AG] that health care entities are likely to refrain from these critical types of transactions in the future, freezing the status quo in California while other states continue to drive toward efficiency and innovation."[11]

Expanding AG Review Authority to For-Profit Health Care Transactions

In recent years, there has been a trend of increasing and onerous conditions for approval for nonprofit transactions already subject to AG review. The AG's conditional approval of nonprofit transactions often requires the continuation of existing levels of community benefits, emergency services, and other essential health care services. In the nonprofit transaction review process, the AG is required to consider any factors it deems relevant, including, in part, whether the agreement or transaction is in the public interest, is at fair market value, involves any breach of trust, creates a significant effect on the availability or accessibility of health care services, or creates a significant effect on the availability and accessibility of cultural interests provided by the facility in the affected community. If enacted, this Bill would newly subject for-profit health care entities contracting in California to similar AG approval that was previously limited to nonprofit transactions. It may be less likely for contemplated transactions between health care entities to receive a green light with no additional conditions.

Borrows from Recently Enacted Legislation Applicable to Health Care Service Plans

Some may recognize that much of the Bill's transactional oversight language mirrors that of Assembly Bill 595 ("AB-595"), also introduced by Assembly member Wood and signed into law in 2019, which gave the DMHC authority to review transactions involving health care service plans. The DMHC is required to consider certain antitrust factors in determining whether a proposed deal constitutes a major transaction, including whether the transaction adversely affects either the subscribers or enrollees or the stability of the health care delivery system because of the entity's market position.[12] If the deal is a major transaction, the path to approval requires public hearings, independent consultant reports on market impact, and involvement with other stakeholders.[13] AB-595 received significant pushback from the health care industry. Mary Ellen Grant, spokeswoman for the California Association of Health Plans, stated, "AB-595 is unnecessary and could increase health care costs . . . It will add unnecessary complexity and duplication to the health plan mergers and acquisition process." Given the length of the proposed review process, this Bill is similarly likely to increase the cost of health care and timeline of the transaction.

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III. Looking Forward in the Legislative Process

AB-2080 was heard in the Committee on Health and the Committee on Judiciary on April 26, 2022 and April 28, 2022, where both committees amended the bill. The Bill received 11 ayes and 3 noes in the Committee on Health and received 7 ayes and 3 noes in the Committee on Judiciary, indicating the Bill has garnered large support in the legislature. The Bill was subsequently amended, and passed by the Committee on Appropriations on May 19, 2022. In the Committee, the Bill received broad support as it passed with 12 ayes and 4 noes. The Bill has now been returned to the Assembly for a second reading, where if passed, it would then move to the Senate and then the Governor for signature.

If you have any questions, please reach out to Benjamin Wilson, Joanna Hwang, Emma Coreno, Shanzeh Daudi or your usual Ropes & Gray advisor.

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1. Assem. Bill 2080, 2021-2022 Reg. Sess. (Cal. 2022), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2080.
2. These types of non-profit corporations are already subject to AG approval, as described in CA Corp. Code § 5914 and § 5920.
3. In its current form, the Bill provides an exception for nonphysician professional practice groups, independent ambulatory surgical centers, and transactions in which a county is taking over a provider to ensure continued community access.
4. The Bill's language is not clear as to whether notice may be required 90 days in advance of entering into *any* definitive agreement.
5. CA Health & Safety Code §1399.65.
6. The AG may also hold public meetings on other transactions, but it is not required to do so.
7. Assem. Bill 2080, *Bill Analysis*, *supra* note 1.
8. CA Health & Safety Code §1399.65(a)(1).
9. Sen. Bill 977, 2019-2020 Reg. Sess. (Cal. 2020), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB977.
10. Chris Cumming, *California Bill to Rein In Private-Equity Health-Care Buyouts Dies*, The Wall Street Journal (Sep. 4, 2020), https://www.wsj.com/articles/california-bill-to-rein-in-private-equity-health-care-buyouts-dies-11599250052.
11. California Hospital Association, Letter in Opposition to AB-2080 (Apr. 8, 2022), https://calhospital.org/wp-content/uploads/2022/04/AB-2080-Asm-Health-FINAL-4.8.22.pdf.
12. CA Health & Safety Code § 1399.65(g)(1).
13. *Id.* at § 1399.65(a)-(c).

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