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Healthcare Alert

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AB-3129 Targets Private Equity Investment in California

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AB-3129 provides oversight authority to the California Attorney General for private equity-backed health care transactions.

What's the impact?

- Private equity groups and hedge funds will be required to provide notice to and obtain approval from the California Attorney General before closing a transaction with certain health care facilities, provider groups, and providers.

In February 2024, California Assembly Bill 3129 (AB-3129) was introduced with the stated purpose of addressing the impact of private equity-backed health care transactions on the cost, accessibility, and quality of health care services in California. AB-3129 was passed by both houses of the California legislature on August 31, 2024, and now awaits signature by Governor Newsom, who has until September 30, 2024 to sign or veto the bill. **If enacted, the bill would be effective on January 1, 2025.**

Under existing law, the California Attorney General (AG) of California has the ability to review and approve transactions involving a nonprofit organization that operates or controls a health facility in California. In addition, the enactment of the Health Care Quality and Affordability Act (HCQAA) in 2022 created the California Office of Health Care Affordability (OHCA), which oversees and approves transactions in California involving health care entities, as described in our prior client alert.

Although the current laws provide a framework for state oversight over certain health care entities and transactions, the enactment of AB-3129 would expand the state's authority to approve a broader set of entities and transactions in the health care market. This also reflects a national trend of increased scrutiny over private equity involvement in health care. Specifically, AB-3129 would require private equity groups and hedge funds to provide notice to, or obtain approval from, the AG before proceeding with transactions with a health care facility, provider group, or provider.

Requirements Under AB-3129

Under AB-3129, a "private equity group" or "hedge fund" is required to provide written notice to, and obtain the written consent of, the AG before a "transaction" with a health care facility, provider group, or a provider. This applies to transactions on or after January 1, 2025—meaning that the statute will apply to any transaction where there is a "material change in the corporate relationship" between the entities on or after January 1, 2025.

AB-3129 instructs the AG, in deciding whether to provide consent or conditional consent to a transaction, to determine "whether the transaction may have a substantial likelihood of anticompetitive effects, including a substantial risk of lessening competition or of tending to create a monopoly, or may create a significant effect on the access or availability of health care services to the affected community."

TRANSACTIONS AND PARTIES SUBJECT TO AB-3129

AB-3129 defines a "transaction" as a direct or indirect acquisition, including lease, transfer, exchange, option, receipt of a conveyance, creation or a joint venture, or any other manner of a purchase, by a private equity group or hedge fund of a "material amount of the assets or operations," or a "change of control," of a health care facility, provider group, or provider doing business in California.

- A "material amount of the assets or operations" means the transaction "affects more than fifteen percent (15%) of the market value or ownership shares of a health care facility, provider group, or provider."
- A "change of control" is "an arrangement in which a private equity group or hedge fund establishes a change in governance or assumes direct or indirect control in whole or in part

over health care services provided by a health care facility, provider group, or provider." Even if less than fifteen percent (15%) of the market value or ownership shares is affected, if a transaction vests supermajority rights, veto rights, exclusivity provisions, and other provisions that effectively constitute a change in control, it will be deemed a "change of control."

"Private equity group" is defined in the bill as "an investor or group of investors who primarily engage in the raising or returning of capital and who invests, or disposes of specified assets." "Hedge Fund" means "a pool of funds managed by investors for the purpose of earning a return." To limit the breadth of the bill's definitions of "private equity groups" and "hedge funds" so as to not encompass nearly all private investments, not just those traditionally thought of as private equity or hedge funds, the final version of the bill clarified that these definitions expressly exclude (1) persons who contribute to a private equity group, but otherwise do not participate in its management or in any change of control of the private equity group or its assets, and (2) entities such as banks, credit unions, commercial real estate lenders, bond underwriters, trustees, and other entities who solely manage debt financing secured by the assets of a health care facility.

CONSENT

AB-3129 requires private equity groups and hedge funds to obtain consent from the AG when entering into a transaction with:

- A "health care facility," which includes settings where services are provided by licensed health professionals other than dentists, including, but not limited to, health facilities providing a patient stay of twenty-four (24) hours or more (except for hospitals), outpatient clinics, ambulatory surgery centers, clinical laboratories, and imaging centers. Notably, the final version of AB-3129 excludes hospitals from the definition "health care facility". Certain transactions involving nonprofit hospitals, however, remain subject to a separate approval process with the AG, so the exclusion of hospitals under AB-3129 effectively excludes for-profit-only hospital transactions.
- A "provider group," which is a group of the following (excluding those that provide dermatology services):
    - Ten (10) or more licensed health professionals; or
    - Two (2) to nine (9) licensed health professionals that generate a gross annual revenue of $25,000,000 or more.
- A "provider," which is a group of two (2) to nine (9) licensed health professionals, if, in the prior seven (7) years, the private equity group or hedge fund has been involved in a transaction involving a health care facility, provider group, or provider, or related health care services.

- A health care facility, provider group, or provider that directly or indirectly controls, is controlled by, is under common control of, or is otherwise affiliated with a payor.

NOTICE ONLY

A private equity group or hedge fund is required to provide notice to the AG, but does not need to obtain the AG's consent, for transactions with a "provider" that is not otherwise required to obtain consent, and that meets the following gross annual revenue thresholds:

- For a nonphysician provider, over $4,000,000; or
- For a physician provider, between $4,000,000 and $25,000,000.

The definition of "provider" does not explicitly carve out professionals that perform dermatology services, and thus, it appears that "providers" are still required to provide notice to—but not obtain consent from—the AG under AB-3129.

TRANSACTIONS NOT SUBJECT TO AB-3129

The requirements of AB-3129 do not apply to the following:

- Transactions involving hospitals, whether for-profit or nonprofit;
- Transactions that have closed before January 1, 2025;
- Subsequent renewals of transactions occurring on or after January 1, 2025, that do not materially affect the corporate relationship between a private equity group or hedge fund and a health care facility, provider group, or provider;
- Transactions involving groups of two (2) to nine (9) licensed health professionals that generate $4,000,000 or less in annual gross revenue;
- The pledge of assets solely to secure a debt obligation, including security agreements, deeds of trust, indentures, financing statements, and liens;
- An offer of employment to, or hiring of, a provider;
- Transactions involving health care service plans that are already subject to review by the California Department of Managed Health Care (DMHC) for cost impact or market consolidation under the Knox-Keene Act;
- Transactions involving health insurers that are already subject to review by the California Department of Insurance for cost impact or market consolidation;
- Transactions in which a county is purchasing, acquiring, or taking control, responsibility, or governance of a health care facility, provider group, or provider *from* a private equity group or hedge fund to ensure continued access to health care services in that county;

- Transactions involving the University of California wherein a private equity group or hedge fund is not purchasing, acquiring, or taking control, responsibility, or governance of a health care facility, provider group, or provider; and
- The transfer by a health district of a health care facility, provider group, or provider to a private equity group or hedge fund.

Although a transfer by a health district of a covered provider does not require notice and consent under AB-3129, a health district is required to obtain an advisory opinion from the AG prior to the transaction, and sufficient information must be submitted for the AG to evaluate the transaction—effectively providing that health districts remain required to provide notice.

The bill also amends the HCQAA to clarify that transactions involving private equity groups or hedge funds that are subject to AB-3129's notice and consent requirements are expressly exempt from the OHCA filing requirement. Stakeholders previously raised concerns of a required filing and review under both frameworks, which may have added costs and administrative burdens for parties, created redundancies between the applications, and lead to potential inconsistencies in oversight decisions.

NOTICE AND CONSENT TIMELINE

A private equity group or hedge fund must provide notice to the AG either at the same time as required by any other state or federal agency pursuant to state or federal law, or otherwise at least ninety (90) days prior to the transaction. The AG is permitted to extend this period by an additional forty-five (45)-day period if:

- An extension is necessary to obtain additional information;
- The proposed transaction is substantially modified after initial notice was provided to the AG; or;
- The proposed transaction involves a multifacility or multi-provider health system serving multiple communities.

Further, if the AG decides to hold a public meeting regarding the proposed transaction, the AG may extend both the initial 90-day review period and the additional 45-day period by fourteen (14) days each.

Within fourteen (14) days after service of the AG's written determination, a private equity group or hedge fund may elect to proceed to an evidentiary hearing before an administrative law judge to review whether the proposed transaction may have a substantial likelihood of anticompetitive effects, may create a significant impact on the access or availability of health care services to the affected community, or generates any other issue identified in the AG's written

determination. The Office of Administrative Hearings is required to "prioritize" the scheduling of such a hearing; however, the timing of such process will likely depend on forthcoming regulations and guidance.

If the AG does not issue its written determination by the specified periods set forth in the legislation, the parties may proceed and close the transaction.

WAIVER

AB-3129 provides a process for parties to seek a waiver of the AG's review. The AG may grant a request to waive review when all of the following conditions are met:

- A party to the transaction requests waiver by submitting a written description of the proposed transaction, a copy of all relevant documents, an explanation of why waiver should be granted, and any other information;
- The health care facilities, provider groups, or provider's operating costs have exceeded its revenue for three or more years and the party cannot meet its debts;
- The health care facility, provider group, or provider provides substantial likelihood that it will have to file for Chapter 11 bankruptcy absent any waiver;
- The health care facility, provider group, or provider provides substantial evidence that it is at risk of liquidation under Chapter 7;
- The transaction would ensure continued health care access in the relevant markets; and
- The health care facility, provider group, or provider made good faith efforts to reasonably assess and elicit alternative arrangements that would have less anti-competitive effects than the proposed transaction.

Following a party's request for waiver, the AG has forty-five (45) days to evaluate and determine whether to grant, deny, or conditionally grant a waiver.

Additional Limitations and Prohibited Practices

AB-3129 also introduces a codified set of limitations governing the operations and practices of private equity groups and hedge funds that contract with health care providers. These are consistent with existing parameters on lay entities involved in the management of certain professional health care services in California (e.g., physician services), historically imposed and overseen by the applicable state licensing authorities.

Under these limitations, private equity groups and hedge funds are prohibited from entering into an arrangement with a physician, psychiatric, or dental practice that interferes with

professional judgment and health care decision-making of these licensees, or exercises control over the clinical practices, including the following:

- Making determinations about diagnostic tests for particular conditions;
- Determining the need for referrals to, or consultation with, another physician, psychiatrist, dentist, or licensed health professional;
- Being responsible for the ultimate overall care of the patient, including treatment options available to the patient;
- Determining how many patients a physician, psychiatrist, or dentist shall see in a given period of time or how many hours a physician, psychiatrist, or dentist shall work;
- Owning or determining the content of medical records;
- Selecting, hiring, or firing clinical personnel based on clinical competency;
- Making decisions regarding a provider's contractual relationships with third-party payors or other providers;
- Deciding procedures regarding coding and billing; and
- Selecting medical equipment and supplies.

Critics of these statutory restrictions point out that California's longstanding ban on the corporate practice of medicine already prohibits lay entities from owning, controlling, and interfering with clinical practices. Earlier versions of AB-3129 sought to limit all management services arrangements between private equity groups or hedge funds, on the one hand, and health care facilities, provider groups, and providers, on the other hand, in exchange for a fee. However, subsequent amendments to the bill have removed this limitation. Notwithstanding, it will be important to monitor the implementing regulations, and further guidance on this aspect, which could have widespread impacts on the way management services are provided in the market.

Additionally, and consistent with the California's general disapproval of non-compete clauses, the proposed bill renders unenforceable any contract in which health care practice working with a private equity group or hedge fund bars any provider, who has been terminated or has resigned from that practice, from working with competing practices. This explicit restriction would not appear to materially change the existing law in California with respect to the enforceability of non-compete covenants.

The AG may impose and enforce conditions on proposed transactions and seek injunctive relief and other equitable remedies to enforce these enforcement provisions. The AG also has explicit authority to consult with other state agencies about a transaction, execute contracts with experts and consultants to assist in its review of the proposed transactions as well as its monitoring of post-closing compliance with any conditions imposed by the AG upon the parties or transactions.

Next Steps and Implications of Enactment

AB-3129 appears to reflect the California Legislature's apprehension with increased involvement of private investors in the health care space. If Governor Newsom signs AB-3129, private equity groups and hedge funds may need to adjust the projected timeline of their transactions effective on or after January 1, 2025 with health care providers to accommodate for AG review under AB-3129 and any related requirements. To date, Governor Newsom's office has yet to release any public statements signaling the Governor's stance on the bill.

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