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Kirkland Alert

Massachusetts Expands Review of Private Equity Investments in Healthcare

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On January 8, the Massachusetts governor signed House Bill 5159 into law, aiming to add further scrutiny to private equity investment in the Commonwealth's healthcare sector. The law expands the existing 60-day prior requirement to provide written notice to, and obtain consent from, the Massachusetts Health Policy Commission ("HPC") before closing a wide range of healthcare transactions. The law will become effective on April 8, 2025.

The bill is a significant addition to the growing legislative and regulatory requirements impacting private equity investments in healthcare companies, and it will affect investors that currently own or are planning to acquire companies with Massachusetts healthcare operations. The law requires the state's agencies to promulgate regulations over the next several months, which could have a significant impact on the scope and applicability of the changes discussed below.

Key takeaways from the bill follow below.

Applicability & Scope Expansion

- **Expansion of Existing Filing Requirement.** Massachusetts' current law requires healthcare providers with more than \$25 million in annual Massachusetts revenue to file a 60-day pre-closing notice of material change transaction to the HPC.
- **New Law Expands Filing Requirements.** The new law expands the transactions that are subject to review to include:
 - transactions that result in a significant expansion in a provider or provider organization's capacity;

- transactions involving significant equity investors that result in a change of ownership or control of a provider, provider organization, or carrier;
- significant acquisitions, sales, or transfer of assets, including, but not limited to, real estate sale lease-back arrangements;
- conversion of a non-profit to a for-profit entity; and
- mergers or acquisitions of provider organizations that will result in the provider organization having a dominant market share in a service or region, to the types of transactions triggering a notice and consent application.

The new law also increases the categories of entities subject to HPC's review when involved in healthcare transactions, to include significant equity investors, healthcare REITs, and management services organizations ("MSOs") (collectively, "investor groups"). Investor groups will be required to submit detailed information on their organizations, management, and financial structure in connection with a required filing.

- The definition of "significant equity investors" is broad and includes (i) **any private equity company** with a financial interest in a provider, provider organization, or management services organization; or (ii) any investor, group of investors, or other entity with 10% or more ownership in a provider, provider organization, or management services organization other than a venture capital firm exclusively funding startups or other early-stage businesses.
- **Timing Expansion:** The bill clarifies that the time periods apply only once HPC determines that a material change notice is complete. As a result, filing deadlines could be tolled or extended until HPC, in its determination, considers the filing complete. These new requirements could significantly lengthen the statutory 60-day pre-close filing timing.
- **Assessment Expansion:** The bill expands the categories of entities subject to an annual assessment to pay for the existence of HPC to include hospitals, ambulatory surgery centers, and non-hospital provider organizations. Non-hospital provider organizations include a non-hospital-based physician practice with more than \$500,000,000 in annual gross patient service revenue, a clinical laboratory, an imaging facility, an ambulatory surgical center, or a network of affiliated urgent care centers. The amount of the assessment will be determined on an annual basis.
- **New Annual and Quarterly Reporting Requirements:** Massachusetts' current law requires certain provider and provider organizations to register annually with the state. The new law will increase the type of information required to be submitted as part of the annual registrations. The law also authorizes the state to request quarterly information submissions from provider and provider organizations with

private equity investment. This additional information may include, but is not limited to:

- *Financial Statements*: Investor groups and filers will be required to provide audited financial statements (including for the parent organization's out-of-state operations);
- *Financial Metrics*: Investor groups and filers will also be required to provide its structure charts, margins (including by payor type), investments, and information on relationships with investor groups regarding costs, annual receipts, realized capital gains and losses, accumulated surplus, and accumulated reserves; and
- *Annual and Quarterly Reporting Requirements*: Provider organizations with investor group involvement will be required to report information annually on an ongoing basis, with some requirements to be provided on a quarterly basis, to HPC. HPC will monitor prior transactions and investments for a five-year period and will let provider organizations and investor groups know of upcoming deadlines for future reporting requirements at a later date

Additional Licensing Requirements

The bill expands the current requirements for Commonwealth licensure to require urgent care clinics and office-based surgery centers to obtain licensure, with licensing regulations – including as to the timing that the new applications will be required – to be promulgated by October 1, 2025. It also places additional restrictions on licensure of acute care hospitals.

- Office-based surgical centers that will be required to obtain a license include offices, groups, or facilities that are owned, leased, or operated by at least one practitioner and that provide invasive procedures under general anesthesia, moderate sedation, or deep sedation, as well as any liposuction.
- Urgent care centers that will be required to obtain a license include those that are owned or operated by a non-hospital-affiliated entity providing diagnosis, treatment, management, or monitoring of acute and chronic disease or injury.
- Acute care hospitals will not be granted original licenses if they meet certain criteria:
 - The main campus is leased from a healthcare REIT, and the agreement was executed after April 1, 2024. Note that prior agreements will be grandfathered in, and grandfather status will be transferrable in a change of ownership.
 - They do not disclose all real estate lease documents.

- They are out of compliance with the Center for Health Information and Analysis (“CHIA”) reporting requirements.

Expansion of Liability for Investments in Healthcare

The law amends the Massachusetts False Claim statute, which is broader than the Federal False Claims statute, to hold private equity and other owners liable in certain circumstances. These amendments:

- Specifically codify the inclusion of investors, including private equity owners, who know of a False Claims Act violation and who do not report and remedy it within 60 days of identification.
- Specifically codifies the Attorney General’s authority to make a civil investigative demand regarding a healthcare entity to investor groups.

While most healthcare lawyers have interpreted the existing authorities to include investor groups, the Massachusetts legislature has taken the additional step of making it clear that this is their intent.

Updates to Determination of Need Requirements

Certain Massachusetts healthcare entities are already subject to requirements to apply for and obtain a determination of need from the Massachusetts Department of Health (“DPH”) when making certain investments in the Commonwealth. However, this bill makes several updates to these existing requirements:

- **Spillover Effect.** DPH will be able to consider failure to report required data to CHIA as part of its approval (or rejection) of determination of need applications, and any final report issued by HPC in connection with a change of ownership or operations must be sent to DPH for consideration during any pending determination of need or other departmental action.
- **Tolling Timeline.** DPH will be able to toll the determination of need timeline for an independent cost analysis, cost and market review, and performance improvement plan, which could increase timing for obtaining a determination of need.

Next Steps

As we wait for the applicable regulations, we do not believe that investors need to take action at this time. Given that there are now 15 states with some form of healthcare transaction review law, and the possibility of others on the horizon, affected parties may want to consider seeking counsel to discuss strategies for current or planned investments in healthcare providers or services.

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Suggested Reading

- 10 January 2025 Kirkland Alert 2025 Healthcare Private Equity Outlook and Considerations
- 06 January 2025 Kirkland Alert OCR Proposes Changes to the HIPAA Security Rule
- 01 January 2025 In the News Healthcare and Life Science Deals Attys Expect In 2025

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