

Memorandum

Congressional Committees Advance Legislation on Private Equity Investments in Healthcare

February 14, 2020

This week, two U.S. House of Representatives committees advanced separate bills with provisions aimed at obtaining more information on private equity investments in certain healthcare providers. These legislative efforts reflect increased congressional interest in understanding the effects of private equity investments on the healthcare system, healthcare costs and patient medical bills. Some members of Congress have expressed concerns about the recent trend of private equity firm acquisitions of physician practices, emergency departments, nursing homes and hospitals.

H.R. 5825, Transparency in Health Care Investments Act

On February 12, 2020, the House Ways and Means Committee approved an amended version of the Transparency in Health Care Investments Act. The bill, H.R. 5825, would require certain persons with controlling interests in healthcare providers to annually report detailed information to the Internal Revenue Service (IRS), including Medicare and Medicaid reimbursement amounts and information on acquisitions and dispositions, indebtedness and real estate. These reports will be made public. Those who fail to file complete and correct returns would be subject to penalties of up to \$1 million per return. Since separate returns must be filed annually for each provider, persons with investments in multiple providers could be subject to penalties over \$1 million. We discuss this bill's provisions in greater detail below.

Under H.R. 5825, each “reporting person” who holds an interest in a “specified medical care provider” must file annual information reports with the IRS.

H.R. 5825 has a three-prong definition of a “reporting person.” A reporting person is any person who (i) holds an interest in a specified medical care provider, (ii) controls (or is related to a person who controls) such specified medical care provider, and (iii) is engaged in raising and returning capital and either invests or develops certain assets (or receives services from a person engaged in such business).

A “specified medical care provider” is an entity that is enrolled as a provider under Medicare or Medicaid or that employs individuals who are so enrolled.

A person who holds more than 50 percent of the vote or value of a corporation or holds more than a 50 percent interest in a partnership is considered to have “control.” In determining control, ownership by other persons with whom the investment is coordinated are taken into account.

The third prong of the definition of a reporting person requires investment or development in certain types of enumerated assets, including any interests in partnerships, securities and real estate.

Even if a person meets all three prongs, the person will not be a reporting person unless one or more persons have a carried interest with respect to the investment. A private equity fund who meets all three prongs would generally be a reporting person due to a general partner’s carried interest entitlement.

The reporting requirements under H.R. 5825 include:

- *Gross Receipts*: separate statements of the amounts received by the specified medical care provider from Medicare and Medicaid, insurers at a negotiated rate and otherwise, sales of receivables, and other categories as determined by the Treasury Secretary.
- *Real Estate*: addresses of all real estate owned or leased, details of debt secured by real estate, and amounts paid and received with respect to real property including separate statements of amounts paid to or from the reporting person or a related person.
- *Payments to Reporting Person*: amounts paid to the reporting person and persons related to it.
- *Acquisitions and Dispositions by a Reporting Person*: the adjustable taxable income for the last taxable year before the reporting person acquired control of the specified medical care provider, debt incurred or guaranteed by the specified medical care provider or a related person in connection with the reporting person’s acquisition, the date of acquisition and disposition of an interest in the specified medical care provider, and the amount of consideration received by the reporting person. In each case, requirements relating to the reporting person also cover any related persons.

The bill’s reporting requirements raise several questions about required reporting persons and potentially duplicative reports, including how members of a “group” would be required to report. The bill would require the Treasury Secretary to issue rules to prevent, to the extent practicable, more than one person from being required to report the same information. The bill does not provide a deadline for the issuance of such regulations.

H.R. 5825 would also require the Treasury Secretary to issue regulations designed to prevent loopholes in the new reporting requirement. Such rules would “prevent the use of intermediaries, agents, nominee ownership, and other arrangements to avoid the application of” the reporting requirement. The House Ways and Means Committee approved an amendment to expand this provision to include “separation from ownership of a specified medical care provider of assets used in the trade or business of such provider.” The amendment was intended to address state laws that prohibit corporations from having an ownership interest in a provider. In some states with

these restrictions, providers may enter into arrangements involving ownership of the provider's assets, such as medical equipment and receivables for medical services performed by the provider. The Chair of the House Ways and Means Committee stated that it was his intention to address other potential loopholes as the bill progresses through the House of Representatives.

H.R. 5825 may be included in a legislative package that reconciles the three House proposals on surprise billing that have been voted out of their respective committees. The House is reportedly hoping to include transparency and surprise billing provisions in legislation that must pass by May 22, 2020, in order to extend funding for and reauthorize several popular healthcare programs.

H.R. 5800, Ban Surprise Billing Act

On February 11, 2020, the House Education and Labor Committee approved an amended version of H.R. 5800, the Ban Surprise Billing Act. The bill addresses protections for patients with health insurance who receive unanticipated medical bills for the difference between an out-of-network provider's charges and the insurer's payment. The bill would require the Comptroller General to study and report on the financial relationships between providers, private equity firms and facilities that use a newly established, independent dispute resolution process to address payment disputes between payers and providers over medical bills that meet certain monetary and other thresholds. The Government Accountability Office (GAO) would submit the report to Congress by December 31, 2023. The contents of such a report could spark additional legislative proposals.

Congressional Focus on Private Equity Investments in Healthcare

The bills advanced this week reflect a broader congressional effort to understand the role of private equity in healthcare and to address surprise medical billing. For example, last fall, the House Energy and Commerce Committee announced a bipartisan investigation into private equity firms and their practices with respect to surprise billing. That committee requested detailed information on private equity firm ownership interests in physician staffing and emergency transport companies. This week, the House Ways and Means Committee Chair discussed a potential request for a GAO study of the questions raised about private equity practices during the discussions of H.R. 5825.

It is not clear what form the legislation on surprise billing and private equity investments in healthcare will take, but surprise billing is seen as a potential area of bicameral, bipartisan agreement during an election year. Congress has introduced numerous other legislative proposals to tackle surprise billing, including another proposal that the House Ways and Means Committee considered this week, the Consumer Protections Against Surprise Medical Bills Act of 2020. Last year, a bipartisan Senate working group introduced the STOP Surprise Medical Bills Act; the Senate Health, Education, Labor, and Pensions Committee passed the Lower Health Care Costs Act; and the House Energy & Commerce Committee passed the No Surprise Act to end surprise medical billing.

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