Putting the Brakes on Healthcare M&A and Provider/Payor Contracting: AB 2080 Poised to Dramatically Impact Healthcare Transactions in California

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Assembly Bill 2080[1] (“AB 2080”), known as the “Health Care Consolidation and Contracting Fairness Act of 2022,” was approved by the California Assembly on May 26, 2022, and if passed by the Senate and signed into law before the August 31st recess, will significantly affect healthcare M&A activity in California for a broad spectrum of healthcare providers, payors and other stakeholders.[2]
The bill imposes a new formidable regulatory hurdle for deals by requiring the Attorney General to approve, deny, or conditionally approve all transactions involving for-profit medical groups, health systems, pharmacy benefit managers, health plans, health insurers and hospitals, where the value of such transaction exceeds $15 million. The bill also seeks to alter the contractual relationships between health systems, physician groups and health plans or insurers by outlawing certain common contractual provisions deemed by the bill’s authors as anti-competitive, or that tend to limit patient choice. Additionally, the bill amplifies the administrative prerogatives of the California Department of Managed Health Care (“DMHC”) for transactions whereby health care service plans (“HCSPs”) acquire another entity.[3]

**Contractual Restrictions for Health Plans and Providers**

Under AB 2080, a contract issued, amended or renewed on or after January 1, 2023, between (i) a HCSP or health insurer and (ii) a healthcare practitioner or health facility, cannot contain certain terms deemed anti-competitive. These prohibited terms include terms that:

- restrict HCSPs or insurers from (a) steering patients to or away from another provider or facility, or (b) offering incentives to patients to utilize or avoid healthcare practitioners;
- require the HCSPs or insurers to (a) contract with other affiliated providers or facilities, or (b) agree to payment rates or terms for a facility or affiliate of a practitioner, as a condition of entering into the contract;
- require HCSPs or insurers to agree to payment rates or other terms for an affiliate or individual not party to the contract;
- restrict HCSPs or insurers not party to the contract from paying a lower rate for items or services than the rate the contracting HCSP pays for those items or services; and
- prevent HCSPs or insurers from providing provider-specific cost or quality of care information to referring providers, the HCSPs or insurer sponsors, enrollees, insureds or eligible enrollees or insureds of the HCSPs or insurers.

The bill clearly targets “tying” or “exclusive dealing” provisions, which are common in professional services contracts between physician groups and health plans. These provisions require health plans to contract with an entire hospital network and its associated medical groups. Such provisions are intended to promote the full utilization of physician networks that have been built out after significant investment by health systems. Health plans are, in turn, rewarded with preferred or discounted rates on healthcare provider services. These mutual benefits are negotiated at arms-length, and may represent a small part of a larger value-based initiative sought by the health plan. AB 2080 outlaws all such tying and exclusive dealing provisions and will thus require the parties to re-evaluate the impact this may have on efficiencies and costs for future contractual relationships.

The bill also targets anti-steering provisions that prohibit a health plan from
steering an enrollee to, or away from, another provider, as well as confidentiality provisions that prevent disclosure by health plans of provider-specific cost or quality information to doctors, hospitals, health professionals or health plans, and by insurers to doctors, physician groups, hospitals or health systems.

The regulatory authority of the Attorney General is further expanded, as the bill authorizes the Attorney General and any other state entity charged with reviewing healthcare market competition, to undertake an independent review of any contract that implements the terms described above, and authorizes such agencies to adopt regulations to implement these provisions.

This portion of the bill is certainly aimed at eliminating provisions the Attorney General has deemed in the past as harmful to healthcare markets, patient access, and patient choice. However, the consequences of the bill will certainly include disruption of certain preferred provider relationships that ultimately benefit patients. For example, the bill would seem to impede the promotion of narrow provider networks that include specialized, cost-efficient providers, or the required use of centers of excellence for certain medical procedures. Arguably, the restrictions imposed by AB 2080 could serve to reduce collaboration and innovation, and stymie arrangements aimed at providing high quality health care at lower costs.

**Pre-Transaction Review and Approval of Healthcare Transactions**

While non-profit health systems are familiar with state agency review and approval of mergers or combinations, for-profit providers engaging in mergers and acquisitions (“M&A”) transactions with other for-profit entities are not. The bill would impose the same regulatory review and approval process imposed on non-profit health systems for M&A transactions between commercial entities such as medical groups, health insurers, hospitals and skilled nursing facilities, where the transaction value exceeds $15 million.

Parties involved in such a transaction must provide notice to the Attorney General at least 90 days prior to closing the deal, and must describe how the transaction will affect cost, quality, and access to health care services for consumers. The Attorney General then has 90 days to notify the parties of a decision to approve, deny or conditionally approve such transaction. The Attorney General would also be required to hold a public meeting before issuing a decision on any “major transaction.”

The Attorney General will weigh the following factors in making its decision:

- potential changes in cost of health care for consumers;
- how the transaction might affect quality of care, and culturally appropriate care;
- whether the transaction is in the public interest; and
- how the transaction will affect access to care and whether it will help maintain access to care in rural areas.

The bill also adds a significant pre-transaction review and approval process with respect to HCSPs. HCSPs are currently required to obtain DMHC approval if the plan
intends to merge with, consolidate with or be acquired by another entity. AB 2080 would expand that review process to any acquisition by a health plan of another entity (think of health plans acquiring providers or a technology company).

**Differing Perspectives and Unintended Consequences**

Proponents of the bill, such as California’s Health Consumer Advocacy Coalition, argue that if left unchecked, consolidation in the healthcare industry leaves consumers worse off in terms of price, quality of care, and access. They argue that Attorney General oversight will ensure access to vital healthcare services for some of California’s most vulnerable communities.

However, opponents of the bill point out that, when healthcare providers are able to partner through mergers, the system is more efficient and access to health care improves. Imposing contractual restrictions will disrupt existing arrangements between payors and healthcare providers that help keep costs low and coordinate care. Furthermore, adding this additional regulatory hurdle means the transacting parties must spend more money to consult legal, financial, and operational experts to analyze the added risk. The cost of this extra consultation will be passed on to consumers, driving up the price of health care services. Finally, the bill would force taxpayer funded institutions, like the Attorney General and the DMHC, to expend more resources to review healthcare transactions.

It seems certain that if the bill is passed, providers and health insurers will face a far more convoluted regulatory environment and uncertainty with regards to their growth plans. Further, for those looking to complete healthcare transactions there will be significant delays and increases in transaction costs – neither of which is helpful to the M&A market and could result in a number of deals faltering before reaching the finish line.

We will continue to monitor and provide updates on any further developments of AB 2080.

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**FOOTNOTES**

[1] [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2080](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2080)

[2] The bill must pass the Senate by August 31, 2022 and must then be signed by the Governor by September 30, 2022, in order to become a validly ratified law.

[3] The bill is not the first of its kind. A similar bill, SB 977, was proposed in last year’s legislative session, but failed to gain Assembly approval.

[4] Health Access Organization: California’s Health Consumer Advocacy Coalition – *Press Release*, dated April 26, 2022: [Major CA Bills to Increase Accountability in Our Health Care System Up In Committee This Week](https://health-access.org)