Client Alert | Antitrust/Competition / Mergers & Acquisitions

Does California's new bill materially impact California health plan mergers?

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In response to the many proposed health insurance mergers in California, Assembly Member Jim Wood[1] introduced Assembly Bill No. 595 ("A.B. 595") in February 2017 to strengthen the DMHC's authority over proposed mergers and provide a forum for public comment. An amended version of A.B. 595 was approved by Governor Jerry Brown on September 7, 2018, which will be added to the California Health and Safety Code. Three proposed mergers under review in California are Cigna/Express Scripts, CVS Health/Aetna and Optum/DaVita.

1) What changes can merging parties expect with respect to the California Department of Managed Health Care (DMHC) process as a result of the enactment of California Assembly Bill No. 595?

Under the new A.B. 595, which takes effect on January 1, 2019, health plans that want to merge will have to obtain approval from the DMHC.[2] California's Knox-Keene Health Care Service Plan Act of 1975 (the "Knox-Keene Act"), which currently governs licensure of health care service plans by the DMHC, requires every nonprofit health care service plan applying to restructure, as defined, or convert its activities to secure approval of the director of the DMHC. Previously, any proposed merger would have been considered a material modification of plans or operations and require *notification* to the director.[3] Effective January 1, 2019, A.B. 595 requires, among other things, a public meeting, the director to assess the competitive impact of the transaction, and the director's approval for the proposed transaction.

Under this new express approval authority, A.B. 595 requires the DMHC, "[p]rior to approving, conditionally approving, or disapproving a major transaction or agreement," to hold a public meeting on the proposal and make specified findings.[4] A "major transaction or agreement" is defined as "a transaction or agreement that meets any of the following criteria: (A) [a]ffects a significant number of enrollees; (B) [i]nvolves a material amount of assets; (C) [a]dversely 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

1 Jim Wood (D-Healdsburg) is the author of A.B. 595 and the Chair of the Assembly Health Committee.

2 Laura Mahoney, *California Health Plan Mergers to Have Stricter Scrutiny*, BLOOMBERG LAW (Sept. 10, 2018), https://biglawbusiness.com/california-health-plan-mergers-to-have-stricter-scrutiny; CAL. HEALTH & SAFETY CODE § 1399.65(a)(1)-(2) (effective Jan. 1, 2019).

3 LEGISLATIVE COUNSEL'S DIGEST: CAL. ASSEMBLY BILL NO. 595 (approved by Governor Sept. 7, 2018), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB595.

4 *Id.*; CAL. HEALTH & SAFETY CODE § 1399.65(c) (effective Jan. 1, 2019).

from a market segment or the entity's dominance of a market segment."[5] If the director finds that a material amount of the health care service plan's assets are subject to merger, consolidation, acquisition, purchase or control, as specified, the director is required to prepare a statement "describing the proposed transaction or agreement" that is publicly available prior to the public meeting.[6]

A.B. 595 specifies circumstances for conditional approval, and includes the requirement that for a major transaction or agreement, the director must obtain an independent analysis of the impact of the transaction on subscribers and enrollees, the stability of the health care delivery system, and other relevant provisions.[7]

In addition to specified circumstances for disapproval, the director may disapprove upon finding "the transaction or agreement would substantially lessen competition in health care service plan products or create a monopoly in this state, including, but not limited to, health coverage products for a specific line of business."[8] The Director "*may* obtain an opinion from a consultant or consultants with the expertise to assess the competitive impact of the transaction or agreement."[9]

2) If the DOJ has cleared a proposed deal, how likely is it that the DMHC would disapprove the proposed merger on the basis of substantial competitive impact?

A.B. 595 does not discuss the impact, if any, of an antitrust determination by the DOJ or any other regulator, including the California Department of Insurance (CDI). Any determination made, or analysis commissioned, by another regulator that issues before a DMHC determination may be considered by the DMHC given that A.B. 595 specifically requires a competitive impact inquiry, but it is unclear what weight the director would give such determination or analysis. Consistent with past practice, it is likely that in the largest and/or most sensitive transactions, the DMHC will continue to require certain undertakings or commitments to benefit consumers. The DMHC will also be able to conditionally approve a deal if it feels there are issues with it; however, it is unclear how such a conditional approval would work in practice.

3) What is the approval/disapproval process for proposed mergers under A.B. 595? How does A.B. 595 change the current timing?

Pursuant to A.B. 595, the DMHC will have express statutory authority to approve or disapprove the change of control of a California health care service plan. In a typical transaction at the holding company level, state insurance and health care regulatory approvals are conditions to closing. Disapproval by the DMHC would cause such a condition to not be satisfied and thereby cause the parties not to close the transaction (unless they waived the condition, which is unlikely). The DMHC would conduct a public meeting pursuant to A.B. 595 § 1399.65(c). The public meeting is to be conducted pursuant to California's Bagley-Keene Open Meeting Act.

Prior to a material modification, a plan shall give notice to the director, who shall, "within 20 business days or such additional time as the plan may specify, by an order approve, disapprove, suspend, or postpone the effectiveness of the change, subject to Section 1354."[10] This timing is customarily waived by the parties to permit the DMHC time to request, and be provided, any additional information that the DMHC deems necessary for its review. If the parties do not agree to extend or waive, they face the possibility that the director will disapprove the material modification. With the enactment of A.B. 595, the director must hold a public meeting and provide at least ten days' prior notice of the public meeting, which must also be made available on the Internet.[11]

There are no other timing requirements currently in place nor does A.B. 595 add additional timing requirements. The DMHC process can already be arduous and lengthy. While the new public hearing

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[5] CAL. HEALTH & SAFETY CODE § 1399.65(g) (effective Jan. 1, 2019).

[6] LEGISLATIVE COUNSEL'S DIGEST, *supra* note 3; CAL. HEALTH & SAFETY CODE § 1399.65(d) (effective Jan. 1, 2019).

[7] CAL. HEALTH & SAFETY CODE § 1399.65(a)(4) (effective Jan. 1, 2019).

[8] *Id.* at § 1399.65(b).

[9] *Id.* (emphasis added).

[10] Knox-Keene Health Care Service Plan Act of 1975 § 1352(b) (amended Jan. 2014).

[11] CAL. GOV'T CODE § 11125(a) (2018).

requirement may add to the timeline for certain transactions, it is unlikely to significantly impact the length of time from filing to approval for the most high-profile deals.

4) If DMHC disapproves the proposed merger, what recourse would the parties have?

"Every final order, decision, license, or other official act of the director under this chapter is subject to judicial review in accordance with the law."[12] Therefore, if the director disapproves modification of the proposed merger or acquisition, the applicant has 30 days after date of mailing of the notice of denial to request an administrative hearing presided over by an administrative law judge.[13] The hearing is to be held in accordance with California's Administrative Procedure Act.[14] The administrative hearing is akin to a mini-trial. Upon a denial after an administrative hearing, the applicant may seek judicial review "in the superior court" within ten days of the denial.[15]

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12 Knox-Keene Health Care Service Plan Act of 1975 § 1397(b) (amended Jan. 2014).

13 *Id.* at §§ 1354, 1397(a).

14 *Id.* at § 1397(a); *see* CAL. GOV'T CODE §§ 11500-11529 (2018).

15 CAL. GOV'T CODE § 11524(c) (2018).