Indiana Enacts Senate Enrolled Act 9 Requiring Notice of Certain Health Care Transactions

April 23, 2024

By: Brian M. Heaton and Maria Vladimirova Geltz

On March 13, 2024, Governor Eric Holcomb signed Senate Enrolled Act 9 ("SEA 9") into law, requiring advance reporting for certain mergers and acquisitions involving Indiana health care entities. Indiana joins a number of other states with similar reporting requirements, although the drafting of SEA 9 is in some ways broader than requirements in other states and the legislation raises a number of unanswered questions.

Beginning on July 1, 2024, any merger or acquisition involving (1) at least one health care entity with at least $10 million in assets; and (2) at least one entity that is an Indiana health care entity, will be required to submit a notarized notice to the Indiana Office of the Attorney General at least ninety (90) days prior to the effective date of the transaction. The size of the transaction or the consideration paid is irrelevant for purposes of meeting the notice requirements under SEA 9. These reporting requirements are also separate from any federal pre-merger filings made to the Federal Trade Commission and Department of Justice pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

Many different types of health care providers may be affected by this legislation. Under SEA 9 and the newly added Ind. Code Sec. 25-1-8.5, the definition of "health care entity" includes any organization or business providing diagnostic, medical, surgical, dental treatment, or rehabilitative care, as well as health insurance providers, health maintenance organizations, pharmacy benefit managers, and notably, private equity partnerships seeking to enter into a transaction with another type of health care entity. In addition, the materiality thresholds under the legislation do little to filter out the number of transactions subject to review by the Attorney General. The $10 million asset size threshold for at least one health care entity includes its combined entities and holdings, and in the case of "Indiana health care entities," there is no minimum asset size threshold, so long as the entity has a presence in the State. These low materiality thresholds capture a much larger number of transactions than what is currently reviewed for antitrust concerns under federal regulation.

Drafted broadly, the scope of SEA 9 is far-reaching. Under SEA 9, a "merger" or "acquisition" includes (1) any arrangement where a person acquires direct or indirect control of another person; and (2) any change of ownership, including through the acquisition or transfer of assets, or the purchase of stock effectuated by a merger agreement. It should be noted that the language of the legislation is broad enough to capture transactions involving a partial sale of assets or ownership, even if a change in control does not occur. Further, the bill does not provide exceptions for related party transactions, and therefore even internal restructurings without any exchanged consideration may still require prior notice to the Attorney General.

Most notably, the language of SEA 9 does not just focus on the direct parties to the merger or acquisition. By its plain reading, the bill requires any health care entity "involved" (though not necessarily a direct party) in such a transaction to submit a notice to the Attorney General, assuming the remaining requirements are also

met. This means health care providers should carefully consider whether another health care entity may have a relationship to the transaction which may trigger the statutory reporting obligations.

Once both health care entities have submitted notices, the Attorney General has forty-five (45) days to review the information for potential antitrust concerns, with the option to invoke a civil investigative demand ("CID") if there is reasonable cause to believe a violation of law has occurred in connection with the transaction. While the Attorney General does not have the authority to approve or deny the transaction, if additional questions remain following a CID, the Attorney General may file a legal action in the circuit or superior court of the county in which the health care entities maintain a principal place of business.

While SEA 9 aims to enhance transparency and enhance antitrust scrutiny, compliance with the legislation could result in potentially significant delays and increased scrutiny, posing challenges for health care providers, including increased costs, talent retention and in the case of struggling health care providers, continued operations.

Practically speaking, we recommend that health care providers in the State of Indiana closely monitor the timing of any transactions planned around July 1, 2024 based on both the enactment of SEA 9 and possible delayed implementation of notice requirements based on the effect date of the legislation. Our firm will be monitoring the release of additional information released by the Indiana Attorney General on SEA 9's reporting requirements.

If you have any questions regarding SEA 9 or the impact it may have on your organization, please contact Brian M. Heaton, Maria Vladimirova Geltz or any member of our Health Care or Business, Acquisitions & Securities Practice Groups.

Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.