

# Congressional Investigation Highlights

## Potential Risks for Private Equity Healthcare Investments

September 19, 2019

On September 16, 2019, the House Energy and Commerce Committee (“House E&C”) announced that it was opening a bipartisan investigation into the role that private equity funds play in what critics call “surprise” medical billing, which occurs when patients are treated at an in-network facility and receive bills for care provided by out-of-network physicians who are employed by third parties. This investigation is part of a broader trend of Congressional scrutiny of private equity firms and the role they play in the healthcare industry.<sup>1</sup>

### CONGRESSIONAL PRIVATE EQUITY INVESTIGATION

The House E&C investigation has its origins in the “No Surprises Act,” which the committee passed unanimously in July 2019. If enacted, this legislation would, among other things: (i) cap the amount that patients pay for emergency services at in-network rates; and (ii) prohibit charging patients treated at in-network facilities for the cost of out-of-network providers unless certain notice and consent requirements were satisfied and bar the practice altogether if there was no alternative in-network provider at the facility. In limited circumstances, a provider would be allowed to commence an arbitration proceeding with an insurer to seek reimbursement at higher rates.<sup>2</sup>

The House E&C investigation was reportedly triggered by a *New York Times* report that an advocacy group engaged in extensive opposition to the “No Surprises Act” received significant funding from two physician-staffing companies that are portfolio companies of private equity firms.

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<sup>1</sup> We [previously](#) addressed the risk that Congressional investigations currently pose to life sciences companies and provided recommendations for handling such investigations.

<sup>2</sup> The Senate Health, Education, Labor and Pensions (“HELP”) committee also approved similar legislation, although without the arbitration provision. This legislation has not yet been brought to the floor of either chamber, but there are reports that there may be votes later this year. It remains uncertain whether any bill regarding so-called “surprise” billing is ultimately enacted into law.

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The House E&C committee subsequently sent letters to three private equity firms expressing “concern[] about the increasing role that private equity firms appear to be playing in physician staffing . . . and the potential impact these firms are having on our rising healthcare costs.”

The letters pose a detailed set of questions regarding, among other things, the finances of each physician-staffing company—including revenue generated from out-of-network billing; the role the private equity firm plays in the management and operation of the physician-staffing company; and the role the private equity firm plays in the negotiations between the physician-staffing company and insurers. The letter asks similar questions about any emergency transportation companies owned by the private equity firm.

### **PROPOSED LEGISLATION TARGETING PRIVATE EQUITY FIRMS**

Congress’s focus on private equity funds has not been limited to medical billing practices. Congressional Democrats have proposed other bills targeting private equity firms.

For example, Senator Elizabeth Warren (D.-Mass.), along with colleagues in the House and Senate, introduced legislation in July 2019 that would hold PE funds jointly and severally liable for legal judgments against companies in their portfolio. The legislation would also prohibit dividends to investors for two years after a firm is acquired and would require PE funds to publicly disclose their fees and returns, among other provisions opposed by the industry. In light of significant Republican opposition, this bill is unlikely to be enacted. However, it is illustrative of the significant hostility that private equity firms face from certain members of Congress and the risks private equity firms may confront in the future under a Democratic administration.

### **TAKEAWAYS FOR PRIVATE EQUITY FIRMS**

In recent years, members of Congress, their media allies and others have sought to target companies that they claim are the drivers of rising healthcare costs in the United States. While their focus was originally on pharmaceutical companies, it appears to be shifting to healthcare provider groups as well. At the same time, hospitals and physician provider groups have frequently been sued by plaintiffs claiming that these entities are engaging in improper billing practices.

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In light of these risks, private equity firms considering investments in hospitals or physician groups should carefully consider:

- whether a target has appropriate compliance mechanisms in place to ensure that its billing practices follow applicable laws; and
- whether potential future regulatory or legislative developments may materially impact the target's valuation.

For an existing portfolio company, it may be prudent to consider periodic audits—potentially with the benefit of outside advisors—to ensure that the company is engaged in appropriate billing practices. Similarly, if private equity firms or their portfolio companies become subject to Congressional investigations, they should develop a strategy that is designed to both address the concerns of legislators and to anticipate future regulatory actions or private litigation regarding the same or related subject matter.

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Please do not hesitate to contact us with any questions regarding congressional inquiries or their collateral consequences. We would be happy to connect you with seasoned lawyers from Debevoise's [Congressional Investigations](#), [Healthcare](#), [Private Equity](#), [White Collar & Regulatory Defense](#) and/or [Civil Litigation](#) teams who can best serve your needs.

**NEW YORK**

Andrew L. Bab  
albab@debevoise.com



Jennifer L. Chu  
jlchu@debevoise.com



Maura Monaghan  
mkmonaghan@debevoise.com



Kevin Rinker  
karinker@debevoise.com



Kevin M. Schmidt  
kmschmidt@debevoise.com



Jacob W. Stahl  
jwstahl@debevoise.com

**WASHINGTON, D.C.**

Samuel Rosh  
sjrosh@debevoise.com



David A. O'Neil  
daoneil@debevoise.com



Paul D. Rubin  
pdrubin@debevoise.com