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The “Break Up Big Medicine Act”: Potential Impacts for Healthcare Investors

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A newly-introduced Senate bill called the “Break Up Big Medicine Act” proposes a federal prohibition on both new and existing common ownership or control of insurers, pharmacy benefit managers (“PBMs”), drug or medical device wholesalers, and certain medical service provider entities. The bipartisan proposal, introduced by Senators Warren and Hawley, is intended as a cost-reduction and patient-protection measure that carries potentially significant implications for investors in diversified healthcare platforms.

The proposed legislation would make it unlawful for any person to own or control either a “provider” or management services organization (“MSO”) while simultaneously owning or controlling an insurance company or PBM. Similarly, it would prohibit common ownership of a provider or MSO and a prescription drug or medical device wholesaler. Persons in violation of the bill’s common ownership or control requirements would have one year to bring their holdings into compliance, regardless of whether the at-issue ownership or control arrangement existed prior to the Senate bill’s enactment. The Senate bill would empower the Federal Trade Commission (“FTC”), Department of Health and Human Services, Department of Justice (“DOJ”), state attorneys general, and private parties to bring actions against persons in violation of the Senate bill’s ownership and control restrictions. The FTC and DOJ would also be authorized to challenge future transactions that would result in ownership or control structures prohibited by the bill.

The bill's definition of "provider" is broad, encompassing physician practices, pharmacies, ambulatory surgery centers, urgent care centers, post-acute providers, and hospitals. The inclusion of MSOs further expands its potential industry impact because private equity-backed healthcare platforms, for example, typically rely on MSO structures to separate clinical ownership from management control in order to comply with state restrictions prohibiting the corporate practice of medicine or related clinical practice restrictions. Under the proposed bill, implementation of such MSO structures would not protect an investor that simultaneously maintains an interest in a covered payor, PBM, or wholesaler.

The bill's restrictions apply to any "person" that owns or controls the relevant entities. The Senate bill incorporates the Sherman Antitrust Act definition of "person" that broadly extends to both natural entities and most corporate entities but does not elaborate on how "control" would be interpreted. Therefore, it is unclear whether minority equity positions with governance rights, negative controls, or similar customary governance protections trigger "control." How "control" is ultimately interpreted will significantly affect the bill's impact on how investors structure their healthcare holdings and the extent to which existing roll-ups may need to be unwound.

Even if the Senate bill does not pass in its current form, it reflects a continued governmental push for structural remedies in an increasingly consolidated healthcare industry. While the bill is consistent with prior counter-consolidation efforts sponsored by Senator Warren, its bipartisan sponsorship suggests that such structural remedies may gain traction via cross-party support. The federal proposal also aligns with existing state legislative efforts targeting corporate structures and affiliate relationships that are perceived to affect healthcare delivery. Arkansas recently enacted legislation prohibiting PBMs from owning pharmacies, reflecting a similar structural-separation approach at the state level. The Arkansas law remains unimplemented pending constitutional litigation, but other states, including California, Massachusetts, and Oregon have successfully enacted legislation that imposes structural guardrails on healthcare ownership and control, primarily in the form of transactional reviews.

Investors with diversified healthcare portfolios should anticipate continued scrutiny of cross-sector holdings at both the federal and state levels and assess whether existing or contemplated ownership structures present structural risk.

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