

HOUSE BILL REPORT

HB 1607

As Reported by House Committee On:
Civil Rights & Judiciary

Title: An act relating to notice of material changes to the operations or governance structure of participants in the health care marketplace.

Brief Description: Concerning notice of material changes to the operations or governance structure of participants in the health care marketplace.

Sponsors: Representatives Caldier, Jinkins, Robinson, Macri and Cody.

Brief History:

Committee Activity:

Civil Rights & Judiciary: 2/13/19, 2/20/19 [DPS].

Brief Summary of Substitute Bill

- Establishes a new chapter requiring that prior notice be given to the Attorney General before the effective date of a proposed material change, such as a merger or acquisition, involving hospitals, hospital systems, and provider organizations.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 10 members: Representatives Jinkins, Chair; Thai, Vice Chair; Irwin, Ranking Minority Member; Goodman, Hansen, Kilduff, Kirby, Orwall, Valdez and Walen.

Minority Report: Do not pass. Signed by 3 members: Representatives Graham, Shea and Ybarra.

Minority Report: Without recommendation. Signed by 2 members: Representatives Dufault, Assistant Ranking Minority Member; Klippert.

Staff: Edie Adams (786-7180).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Washington's Consumer Protection Act.

Under the state's Consumer Protection Act (CPA), various anticompetitive business practices are declared unlawful. Business practices prohibited by the CPA include:

- engaging in unfair methods of competition and unfair or deceptive acts or practices in the conduct of commerce, including contracts, trusts, or conspiracies in restraint of trade;
- monopolizing or attempting to monopolize trade;
- entering into agreements not to purchase from the competitors of a particular seller when the agreement substantially lessens competition or tends to create a monopoly; and
- acquiring corporate stock when the acquisition substantially lessens competition or tends to create a monopoly.

The Antitrust Division of the Office of the Attorney General investigates and prosecutes violations of the CPA and also has authority to investigate and prosecute federal antitrust law violations. The Attorney General may bring an action in the name of the state on behalf of persons injured by CPA violations. In addition, a private party may bring an action to enforce the CPA.

The Hart-Scott-Rodino Antitrust Improvements Act.

The federal Hart-Scott-Rodino Antitrust Improvements Act of 1976 requires companies intending to engage in certain mergers or acquisitions to provide premerger notification to the United States Federal Trade Commission and the Department of Justice before consummating these transactions. The reporting requirement applies to proposed transactions that satisfy certain size and other criteria, and each party to a transaction that meets the criteria must file notifications and wait a specified period of time, typically 30 days, before consummating the transaction. The waiting period enables the enforcement agencies to review whether the effect of the transaction will substantially lessen competition.

Summary of Substitute Bill:

A new chapter is established requiring hospitals, hospital systems, and provider organizations to provide prior written notice to the Attorney General for certain transactions that result in a material change.

Notice of Material Change Required.

Each party to a transaction that results in a material change must submit written notice to the Attorney General at least 60 days before the effective date of the transaction. A material change includes a merger, acquisition, or contracting affiliation between two or more of the following types of entities: hospitals; hospital systems; or provider organizations.

A material change includes proposed mergers, acquisitions, or contracting affiliations between a Washington entity and an out-of-state entity where the out-of-state entity generates \$10 million or more in net patient service revenue from patients residing in Washington. Any party to a material change that is licensed or operating in Washington must submit the required notice.

A material change does not include a merger, acquisition, or contracting affiliation between two or more hospitals, hospitals systems, or provider organization entities that had common ownership or a contracting affiliation prior to the transaction.

The notice requirement applies to transactions with an anticipated effective date on or after January 1, 2020.

Notice Contents.

The written notice provided by each party must include:

- the names of the parties and their current business addresses;
- identification of all locations where health care services are currently provided by each party;
- a brief description of the nature and objectives of the proposed material change; and
- the anticipated effective date of the proposed material change.

A party may voluntarily supply the Attorney General with additional information. The Attorney General must make any requests for additional information from the reporting parties within 30 days of the date the notice of material change is provided; however this requirement does not preclude the Attorney General from conducting an investigation or enforcing state or federal antitrust laws at a later date.

Notice of Filings under the Hart-Scott-Rodino Act Required.

Any provider or provider organization conducting business in Washington that files a premerger notification with the Federal Trade Commission or the United States Department of Justice in compliance with the federal Hart-Scott-Rodino Antitrust Improvements Act is required to provide written notification to the Attorney General of the filing. Providing a copy of the federal filing to the Attorney General satisfies the notice requirement for material changes.

Materials Submitted to the Attorney General.

Information submitted to the Attorney General must be maintained by the Attorney General in the same manner and under the same protections as required by other provisions of the Consumer Protection Act (CPA) that restrict the use of documents and materials produced under civil investigative demands. The information must not, unless otherwise ordered by a court for good cause, be produced for inspection or copying pursuant to the Public Records Act by the person who produced the information.

Nothing in the act expands the Attorney General's authority under the CPA, state and federal antitrust law, or other law.

Penalty for Noncompliance.

A person who fails to comply with the act is subject to a civil penalty of up to \$200 for each day of noncompliance. Failure to comply with the act does not create a private cause of action.

Definitions.

Key terms are defined, including the following:

"Acquisition" means an agreement, arrangement, or activity that results in a person acquiring directly or indirectly the control of another person, including the acquisition of voting securities and noncorporate interests, such as assets, capital stock, membership interests, or equity interests.

"Contracting affiliation" means the formation of a relationship between two or more entities that permits the entities to negotiate jointly with carriers or third-party administrators over rates for professional medical services, or for one entity to negotiate on behalf of the other entity with carriers or third-party administrators over rates for professional medical services. "Contracting affiliation" does not include arrangements among entities under common ownership.

"Hospital system" means a parent corporation of one or more hospitals and any entity affiliated with such parent corporation through ownership or control, or a hospital and any entity affiliated with such hospital through ownership.

"Provider" means a natural person who practices a profession identified in RCW 18.130.040.

"Provider organization" means a corporation, partnership, business trust, association, or organized group of persons, whether incorporated or not, which is in the business of health care delivery or management and that represents seven or more health care providers in contracting with carriers or third-party administrators for the payments of health care services. A "provider organization" includes physician organizations, physician-hospital organizations, independent practice associations, provider networks, and accountable care organizations.

"Third-party administrator" means an entity that administers payments for health care services on behalf of a client in exchange for an administrative fee.

Substitute Bill Compared to Original Bill:

The substitute bill makes the following changes:

- requires the notice of proposed material change to be given to the Attorney General 60 days (rather than 30 days) prior to its anticipated effective date;
- provides that a material change does not include a merger, acquisition, or contracting affiliation between entities that had common ownership or a contracting affiliation prior to the transaction, and specifies that covered out-of-state entities are hospitals, hospital systems, and provider organizations;
- removes the requirement that the notice must include a copy of all current agreements governing the proposed material change, adds a requirement that the notice must include identification of all locations where health care services are currently provided by each party, and provides that the parties may voluntarily supply the Attorney General with additional information;
- provides that information submitted to the Attorney General under the act must not be produced for inspection or copying under the Public Records Act by the person who produced or provided the information unless otherwise ordered by a court for good cause shown;

- states that nothing in the act expands the Attorney General's authority under the Consumer Protection Act or federal or state antitrust law, and failure to comply with the act does not give rise to a private cause of action; and
 - revises definitions for "carrier," "contracting affiliation," "health care services revenue," "hospital," "hospital system," "merger," "person," and "provider organization."
-

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) There is concern about health care entities engaging in mergers or acquisitions that gobble up smaller entities and create a monopoly in a region. The CHI Franciscan case is an example where the Attorney General has determined that there were serious antitrust issues resulting from the transaction. The legislation requires notice before completion of the transaction to give the Attorney General time to determine whether there are any antitrust concerns.

This is an important bill for patients. Health care entities always say these transactions will result in increased services and a higher quality of care, but the public does not know if this is true because there is no notice or information about the transaction. Reduced competition is leading to worse outcomes for patients. Competition is critical for high quality and cost effectiveness of health care for the public. The more competition there is in the marketplace, the better the outcomes for patients and consumers. The bill will provide notice so that it can be determined whether these transactions are good for consumers and the system.

The Attorney General, as the primary antitrust enforcement officer in the state, wants to ensure that competition remains robust in the health care marketplace. The Office of the Attorney General (AGO) only learns about these transactions from the news, consumer complaints, or if the parties voluntarily report. Federal reporting requirements apply to transactions of a certain size. This creates a gap in required reporting that has led to a number of transactions that have flown below the radar. The bill allows the AGO to review these transactions before they occur. It does not provide any additional enforcement authority.

(Opposed) Many conversations and a lot of hard work have occurred with respect to this proposal. The substitute bill has been narrowed, but there are still concerns. The bill is overly broad and places an unnecessary burden on providers. Most transactions are not a concern, and the Attorney General currently has the ability to intervene when there is reason for concern. The reason providers enter into these transactions is to preserve access to care, not to engage in anti-competitive behavior. There is a significant concern about the

confidentiality of these documents once given to the Attorney General. Information submitted by public hospitals is not confidential under the Consumer Protection Act.

The bill presumes these transactions are suspect, whereas currently we presume that they are fine unless there is some indication for concern. The bill singles out hospitals and provider organizations, but it does nothing to address insurance carriers. There is cause for real concern with transactions being entered into by carriers, and it is not right to single out only the providers. The bill should apply to all relevant parties. There is a perception that these transactions are hostile takeovers, but physician groups are entering into these transactions to remain viable and keep their doors open, or to relieve administrative burdens associated with excessive regulation.

Persons Testifying: (In support) Representative Caldier, prime sponsor; Lindsey Grad, Service Employees International Union Healthcare 1199 Northwest; and Brittany Gregory, Office of the Attorney General.

(Opposed) Chris Bandoli, Washington State Hospital Association; and Sean Graham, Washington State Medical Association.

Persons Signed In To Testify But Not Testifying: None.