

SENATE BILL REPORT

SHB 1607

As Reported by Senate Committee On:
Law & Justice, March 28, 2019

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: House Committee on Civil Rights & Judiciary (originally sponsored by Representatives Caldier, Jinkins, Robinson, Macri and Cody).

Brief History: Passed House: 3/08/19, 63-35.

Committee Activity: Law & Justice: 3/21/19, 3/28/19 [DP, DNP, w/oRec].

Brief Summary of Bill

- Requires prior notice to the attorney general 60 days before the effective date of a proposed material change of governance or operations of hospitals, hospital systems, and provider organizations participating in the state's health care market.
- Applies to mergers, acquisitions, or contracting affiliations involving hospitals, hospital systems, and provider organizations having an anticipated effective date on or after January 1, 2020.
- Requires entities to provide the attorney general with a copy of any filing they submit to federal antitrust authorities under the federal premerger notice requirements.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Kuderer and Salomon.

Minority Report: Do not pass.

Signed by Senator Holy.

Minority Report: That it be referred without recommendation.

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.

Signed by Senator Padden, Ranking Member.

Staff: Melissa Burke-Cain (786-7755)

Background: Enforcement of Antitrust Laws. Most states have antitrust laws, as does the federal government. These laws protect consumers by prohibiting business practices that unreasonably deprive consumers of the benefits of marketplace competition.

The Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) enforce federal antitrust laws. The antitrust division of the DOJ litigates criminal and civil enforcement actions. The FTC's authority includes civil enforcement actions requiring expertise in certain segments of the economy where consumer spending is high. These subject areas include health care, pharmaceuticals, professional services, food, energy, and certain high-tech industries like computer technology and Internet services. Legally required pre-merger filings, complaints from consumers or businesses, and inquiries from government agencies trigger FTC investigations.

State attorneys general may bring federal antitrust suits on behalf of individual state residents or on behalf of the state as a purchaser. A state attorney general may also bring an action to enforce the state's own antitrust laws. State attorneys general may also cooperate with federal authorities in joint investigations of antitrust law violations.

Washington's Consumer Protection Act. Washington's Consumer Protection Act (CPA) prohibits certain anticompetitive business practices including:

- 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 state attorney general's office investigates and prosecutes violations of the CPA. The attorney general 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 (HSR Act) requires parties to significant mergers, acquisitions, or other transactions to notify the FTC and the DOJ before consummating the transactions. The notice requirement allows the FTC and DOJ to consider whether they need additional information to assess whether the transaction violates antitrust laws or could cause anti-competitive effects in the parties' markets.

The FTC amends the thresholds triggering the premerger notification, and the civil penalties for non-compliance with the HSR Act's notice requirements, each year based on changes in the gross national product. The FTC publishes the updated thresholds in the Federal Register. The updates take effect 30 days after publication. The 2019 updates take effect on April 3, 2019.

Summary of Bill: Hospitals, hospital systems, and provider organizations must provide prior written notice to the attorney general for transactions that result in a material change of governance or operations at least 60 days before the effective date of the transaction. A material change includes a merger, acquisition, or contracting affiliation between a Washington entity and an out-of-state entity where the out-of-state entity generates \$10 million or more in health care services revenue from patients who are Washington residents. Any party to a material change that is licensed and operating in the state must submit the notice. A material change does not include a transaction between hospitals, hospital systems, or provider organizations that had a previous common ownership or a contracting affiliation. The notice requirement applies to transactions with an anticipated effective date on or after January 1, 2020.

The notice to the attorney general must:

- provide the parties' names and current business addresses;
- identify all locations where each party currently provides health care services;
- describe the nature and purpose of the proposed material changes; and
- provide the anticipated effective date of the proposed material change.

The parties may voluntarily include additional information with the notice. The attorney general may request additional information from the parties under the CPA within 30 days of the date of the notice. However, nothing in this measure prevents the attorney general from conducting an investigation or enforcing state or federal antitrust laws later.

A provider or provider organization that files a notice with the FTC and DOJ under the HSR Act must provide a copy of the filing to the attorney general. An organization that sends a copy of an HSR Act filing to the attorney general satisfies the notice requirement in this chapter.

The materials, documents, transcripts, and other information submitted to the attorney general are not subject to disclosure without a superior court order. The civil noncompliance penalty for violating this chapter is up to \$200 per day for each day of violation.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: The impetus for this bill was the purchase of the hospital in Kitsap County by CHI Franciscan at a time when some smaller medical

practices were having a difficult time or losing money. CHI Franciscan bought the medical practices and obtained a large share of the providers in certain specialties in the community. Then, the prices for services went up significantly in those specialties because the only providers were CHI Franciscan practices. The attorney general filed a lawsuit over violations of antitrust provisions in the state's consumer protection act in August. A settlement was reached last week, but the settlement details are not available until April 29th. The enforcement problem for the attorney general was that there was no way to know about the proposed buy-out of the hospital and medical practices until it had already happened. You can not undo the damage that occurred after the fact. In the Kitsap County vicinity you only have CHI Franciscan providers available in some specialties. The substitute bill requires notice of this kind of transaction 60 days in advance to the attorney general so that the antitrust implications can be considered, analyzed, and acted upon when warranted. If there are anti-competitive effects, and prices consumers pay could be affected, it can be discovered in advance before damage occurs. Notice would be required even if the transaction did not meet the minimum threshold notice requirement under the federal law. This bill allows the attorney general to review the transaction before it is finalized.

CON: This bill shifts the paradigm to a presumption that every merger is suspect. Providers can benefit from mergers, for example, from administrative economies of scale that provide savings. This bill does not include third-party administrators or carriers who are also market participants. We are also concerned about privacy regarding the terms of these transactions. These agreements are typically private until all the terms are complete and the ink on the agreement dries. We cannot be assured that advance notice of deals that are not final will stay private. It is true that the Washington State Hospital Association and the Washington State Medical Association negotiated on changes to this bill. CHI Franciscan did not; we have opposed the bill all along and still do.

Persons Testifying: PRO: Representative Michelle Caldier, Prime Sponsor; Erica Koscher, Assistant Attorney General.

CON: Matt Miller, CHI Franciscan.

Persons Signed In To Testify But Not Testifying: No one.