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CLIENT ALERT

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California Senate Passes Bill Granting the Attorney General Authority To Review Health Care Acquisitions and Changes of Control

SB 977 was passed by the California Senate on June 26, 2020. If the bill is passed by the Assembly and becomes law, it will require health care systems, private equity groups, hedge funds, and academic medical centers to obtain advance approval by the California Attorney General for substantially all acquisitions or change of control transactions with health care facilities and providers.¹

The stated purpose of the bill is to prevent anticompetitive health care consolidation in California. If enacted into law, the law will apply to transactions entered into on or after January 1, 2021.

Transactions Over \$500,000

If the transaction value is over \$500,000, a health care system (defined as “an entity or system of entities that includes or owns three or more hospitals within the state of which at least one is a general acute care hospital”), a private equity group, or hedge fund must give notice to, and obtain the written consent of, the Attorney General prior to any acquisition, or change of control, between it and a health care facility or a provider.

A “health care facility” is defined as a “facility, nonprofit or for-profit corporation, institution, clinic, place, or building where health-related physician, surgery, or laboratory services are provided, including ... a hospital, clinic, ambulatory surgery center, treatment center, or laboratory or physician office located outside of a hospital.” A “provider” is defined as “an individual or group of individuals that provides health-related physician, surgery, or laboratory services to consumers”

The Attorney General is *required* to deny consent to the transaction unless the health care system, private equity group, or hedge fund demonstrates that the acquisition or change of control will result

¹ SB 977, as passed by the California Senate, addresses “acquisitions” and “affiliations.” As amended in the State Assembly by amendment dated July 27, 2020, the term “affiliation” was replaced by “change of control.” The text of the amended bill is at http://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB977.

in a substantial likelihood of clinical integration (defined as a reduction in costs or an increase in quality of care), a substantial likelihood of increasing the availability and access of services to an underserved population, or both.

The Attorney General *may* also deny consent if there is a substantial likelihood of anticompetitive effects that outweigh the benefits of clinical integration or increase in services to an underserved population. “Anticompetitive effects” include raising market prices, diminishing quality, reducing choice, or diminishing availability of, or access to, hospital or health care services.

A health care system, private equity group, or hedge fund located in a rural area may request a waiver of these requirements if the acquisition or change of control would directly benefit consumers of health care services in rural areas by improving access or availability of health care services, or if the acquisition or change of control is needed to improve the health, safety, and wellbeing of consumers of health care services in rural areas.

The Attorney General will have 60 days to clear the transaction, grant the rural waiver, or request additional information. If additional information is requested, the Attorney General will have 45 days after his certification of compliance with the request for information, to grant or deny consent to the transaction. The Attorney General may also require a public meeting. If the Attorney General does not act within 60 days, the parties may proceed with the transaction.

Any of the parties to the acquisition or change of control may appeal the Attorney General’s final determination by a writ of mandate to the Superior Court.

If the proposed transaction is also subject to existing law requiring Attorney General consent to the sale, lease, disposition of assets, or change of control of a nonprofit health facility, the review process will be conducted concurrently, to the extent practicable.

Transactions of \$500,000 or Less and Academic Medical Centers

A health care system that is acquiring or making a change of control with a provider, group of providers, or health care facility for a transactional value of \$500,000 or less, or an academic medical center that is acquiring or making a change of control with a provider, group of providers, or health care facility for any transaction value, must give notice to, and obtain the written consent of, the Attorney General.

Within 30 days of receipt of notice, the Attorney General must notify the health care system that either the Attorney General does not object to the transaction, or that the Attorney General has found the transaction to raise substantial competitive concerns based on an analysis of market shares of the provider, group of providers, or health care facility in any relevant market.

If the Attorney General does not act within 30 days, the health care system may proceed with the transaction.

Health Policy Advisory Board

Beginning July 1, 2021, the Attorney General is also required to establish a Health Policy Advisory Board. The Board will be comprised of (a) the Attorney General or a designee of the Attorney General, (b) five members appointed by the Attorney General (consisting of a university professor that specializes in health care systems, economics, and antitrust law, and representatives of a health care system, a health care provider, health plans, employers as purchasers of health care services, and organizations that represent union trustees of health care trusts), (c) a member appointed by the Governor, (d) two members appointed by the Senate Committee on Rules (one of whom must be a representative of a consumer group), and (e) two members appointed by the Speaker of the Assembly (one of whom must be a representative of a consumer group).

The Board, which will meet quarterly in open meetings, will be required to produce or commission an annual report on the conditions in health care markets in California relating to acquisitions and changes of control, including cost and quality analysis.

Upon request by the Attorney General, the Board may also review notifications of transactions submitted for Attorney General review and provide the Attorney General with written information as to whether to grant or deny consent. The Attorney General may, but is not required to, consider the recommendation of the Board.

Anti-Competition Enforcement by the Attorney General

If enacted into law, the bill will also make it unlawful for one or more health care systems, either independently or dependently, to use their market power to cause anti-competitive effects. Anti-competitive effects include raising market prices, diminishing quality, reducing choice, increasing the total cost of care, or diminishing availability of, or access to, hospital or nonhospital health care services. A health care system will be presumed to be acting unlawfully if it has substantial market power in any market for any service or trade in commerce and the conduct involves tying or exclusive dealing.

A health care system will not be acting unlawfully if its conduct directly and significantly benefits consumers of services in the market, or if the health care system and its conduct are located entirely in a rural area and the benefits substantially outweigh any actual or likely anticompetitive effects.

The Attorney General may bring a civil enforcement action in the Superior Court at any time up to four years after the cause of action accrues.

Civil fines for violations are the greater of (a) \$1 million, or (b) twice the gross gain to the health care system or gross loss to any other parties multiplied by two. The fine is required to be deposited into the Attorney General antitrust account within the General Fund. The court may also award monetary relief to the State equal to three times the total damage sustained, plus interest, costs, and a reasonable attorney's fee.

Opposition to Passage of the Bill

The California Hospital Association is on record as “strongly against” the bill and has lobbied against it. The bill is, however, expected to pass in the State Assembly and become law.

Notably, the bill authorizes the Attorney General to adopt regulations to implement its provisions, including regulations that extend the time periods for review of proposed transactions.



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