

AMENDED IN SENATE MAY 19, 2020
AMENDED IN SENATE MARCH 16, 2020

SENATE BILL

No. 977

Introduced by Senator Monning

February 11, 2020

An act to add Division 1.7 (commencing with Section 1190) to the Health and Safety Code, relating to health facilities.

LEGISLATIVE COUNSEL'S DIGEST

SB 977, as amended, Monning. Health care system consolidation: Attorney General approval and enforcement.

(1) Existing law requires any nonprofit corporation that operates or controls a health facility or other facility that provides similar health care to provide written notice to, and to obtain the written consent of, the Attorney General prior to entering into any agreement or transaction to sell, transfer, lease, exchange, option, convey, or otherwise dispose of the asset, or to transfer control, responsibility, or governance of the asset or operation, to a for-profit corporation or entity, to a mutual benefit corporation or entity, or to a nonprofit corporation, as specified. Existing law authorizes the Attorney General to determine what information is required to be contained in the notice.

This bill would require a health care system, as defined, *private equity group, or hedge fund* to provide written notice to, and obtain the written consent of, the Attorney General prior to an affiliation or acquisition between the health care system and a health care facility or provider, as those terms are ~~defined~~ *defined, when the transaction value is over \$500,000*. The bill would require the Attorney General to deny consent to an affiliation or acquisition between a health care ~~system~~ *system, private equity group, hedge fund, and a nonhospital* health care facility,

provider, or both, unless the health care ~~system~~ *system, private equity group, or hedge fund* demonstrates that the affiliation or acquisition will result in a substantial likelihood of clinical integration, a substantial likelihood of increasing the availability and access of services to an underserved population, or both. The bill would authorize a health care ~~system~~ *system, private equity group, or hedge fund* located in a rural area, as defined, to request a waiver of this prohibition. The bill would authorize the Attorney General to deny consent to an affiliation or acquisition between a health care ~~system~~ *system, private equity group, or hedge fund* and a ~~nonhospital~~ health care facility, provider, or both, if there is a substantial likelihood of anticompetitive effects that outweigh the benefits of a substantial likelihood of clinical integration, a substantial likelihood of an increase in services to an underserved population, or both.

This bill would require a health care system that is acquiring or affiliating with a provider, group of providers, or health care facility for a transactional value of \$500,000 or less to provide written notice to the Attorney General and would require the Attorney General to provide one of 2 specified notices within 30 days, either not objecting to the transaction or raising concerns, as specified.

This bill would require the Attorney General, beginning July 1, 2021, to establish the Health Policy Advisory Board, composed of specified appointed members, for the purpose of evaluating and analyzing health care markets in California and providing recommendations to the Attorney General's office. The bill would authorize the board to review a written notification submitted by a health care system, as described above, and provide the Attorney General with written information with regard to whether to grant or deny consent to the affiliation or acquisition.

(2) Existing law authorizes the Attorney General to bring an action, seeking civil penalties, against any person who engages, has engaged, or proposes to engage in unfair competition. Existing law authorizes the Attorney General to bring the civil action in a court of competent jurisdiction.

This bill would make it unlawful for one or more health care systems, either independently or dependently, to use their market power to, among other things, cause anticompetitive effects, as described, and would authorize the Attorney General to bring a civil action for a violation of this unlawful conduct. The bill would require a court to impose civil fines for these violations, calculated either as \$1,000,000

or as twice the gross gain to the health care system or gross loss to any other party multiplied by 2, whichever is greater. The bill would require the fines to be deposited into the Attorney General antitrust account within the General Fund. The bill would require a court to impose monetary relief for the state in the amount of 3 times the total damage sustained, as specified.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Division 1.7 (commencing with Section 1190)
2 is added to the Health and Safety Code, to read:

3
4 DIVISION 1.7. HEALTH CARE SYSTEM CONSOLIDATION

5
6 1190. (a) For purposes of this division, the following
7 definitions shall apply:

8 (a)

9 (1) "Acquisition" means the direct or indirect purchase in any
10 manner, including, but not limited to, lease, transfer, exchange,
11 option, receipt of a conveyance, creation of a joint venture, or any
12 other manner of purchase, by a health care system, private equity
13 group, or hedge fund of all, or any part of, the assets of a health
14 care facility or provider. A transfer includes, but is not limited to,
15 any arrangement, written or oral, that alters voting control of,
16 responsibility for, or control of the governing body of the health
17 care provider.

18 (b)

19 (2) "Affiliation"—~~mean~~ *means* an agreement, association,
20 partnership, joint venture, or other arrangement in which a health
21 care system ~~sets up a cooperative relationship involving a bundling~~
22 ~~of health care services, a~~ *establishes a change in governance or*
23 *sharing of control over health care services provided by that health*
24 *care facility or provider, or in which a health care system otherwise*
25 *acquires direct or indirect control over the operations of a health*
26 *care facility or provider in whole or in substantial part. An*
27 *affiliation does not exist where a health care system only extends*
28 *an offer of employment to, or hires, a provider.*

29 (c)

1 (3) “Board” means the Health Policy Advisory Board established
2 pursuant to Section 1190.5.

3 ~~(d)~~

4 (4) “Clinical integration” means a showing by the health care
5 ~~system~~ *system, private equity group, or hedge fund* affiliating with
6 or acquiring the health care facility that there will likely be a
7 reduction in costs to the benefit of consumer care and outcomes
8 or an increase in the quality of ~~care~~ *care as a result of the*
9 *acquisition or affiliation*. An increase or improvement in quality
10 of care ~~may~~ *shall* include a showing of a reduction in morbidity
11 or mortality, *better population health care management,*
12 *improvement in nationally recognized quality measures, including,*
13 *but not limited to, measures used or endorsed by the National*
14 *Committee for Quality Assurance, the National Quality Forum,*
15 *the Physician Consortium for Performance Improvement, the*
16 *Agency for Healthcare Research and Quality, others recognized*
17 *or used by the federal Centers for Medicare and Medicaid Services,*
18 or any other commonly accepted metric or standard for improving
19 consumer health and patient outcomes.

20 ~~(e)~~

21 (5) “Health care facility” means a facility, nonprofit or for-profit
22 corporation, institution, clinic, place, or building where
23 health-related *physician, surgery, or laboratory* services are
24 provided, including, but not limited to, a hospital, clinic,
25 ambulatory surgery center, treatment center, or laboratory or
26 physician office located outside of a hospital.

27 ~~(f)~~

28 (6) “Health care system” means ~~any~~ *an* entity or system of
29 entities that includes or owns two or more hospitals within multiple
30 counties, or three or more hospitals within one county.

31 ~~(g)~~

32 (7) “Hedge fund” means ~~any~~ *a* pool of funds by investors,
33 including ~~any~~ *a* pool of funds managed or controlled by private
34 limited partnerships, if those investors or the management of that
35 pool or private limited partnership employ investment strategies
36 of any kind to earn a return on that pool of funds.

37 ~~(h)~~

38 (8) “Hospital” means ~~any~~ *a* general acute care hospital, acute
39 psychiatric hospital, or special hospital, as those terms are defined
40 in subdivision (a), (b), or (f) of Section 1250, respectively.



1 ~~(i)~~
2 (9) “Private equity group” means ~~any~~ an investor or group of
3 investors who engages in the raising or returning of capital and
4 who invests, develops, or disposes of specified assets.

5 ~~(j)~~
6 (10) “Provider” means an individual or group of individuals
7 that provides health-related *physician, surgery, or laboratory*
8 services to consumers, including, but not limited to, licensees as
9 defined under Division 2 (commencing with Section 500) of the
10 Business and Professions Code.

11 ~~(k)~~
12 (11) “Rural area” means a medical service study area with a
13 population density of fewer than 250 persons per square mile and
14 no population center in excess of 50,000 within the area, as
15 determined by the Office of Statewide Health Planning and
16 Development.

17 ~~(l)~~
18 (12) “Underserved population” means a population with an
19 income threshold below 138 percent of the United States
20 Department of Health and Human Services federal poverty
21 guidelines, a population served by the Medi-Cal program, an
22 uninsured population, a rural area, or a combination thereof.

23 ***(b) These definitions shall not apply to acquisitions or***
24 ***affiliations entered into prior to January 1, 2021, including***
25 ***subsequent renewals, as long as those acquisitions or affiliations***
26 ***do not involve a material change in the corporate relationship***
27 ***between a health care system and a health care facility or provider,***
28 ***or a material change in the corporate relationship between the***
29 ***private equity group or hedge fund and a health care facility or***
30 ***provider, on or after January 1, 2021.***

31 1190.5. (a) Beginning July 1, 2021, the Attorney General shall
32 establish the Health Policy Advisory Board for the purpose of
33 evaluating and analyzing health care markets in California and
34 providing recommendations to the Attorney General’s office, for
35 purposes of this division.

36 (b) The board shall be comprised of all of the following
37 members:

38 (1) The Attorney General, or the Attorney General’s designee.

39 (2) All of the following, who are appointed by and serve at the
40 pleasure of the Attorney General:

1 (A) A university professor that specializes in health care
2 systems, economics, and antitrust law.

3 (B) A representative from a health care system.

4 (C) A representative from a health care provider.

5 (D) A representative of health plans.

6 (E) A representative of employers as purchasers of health care
7 services.

8 (F) A representative of organizations that represent union
9 trustees of health care trusts.

10 (3) One member who is appointed by and serves at the pleasure
11 of the Governor.

12 (4) Two members who are appointed by and serve at the pleasure
13 of the Senate Committee on Rules, one of whom shall be a
14 representative of a consumer group.

15 (5) Two members who are appointed by and serve at the pleasure
16 of the Speaker of the Assembly, one of whom shall be a
17 representative of a consumer group.

18 (c) (1) The board shall annually produce or commission a report
19 on the conditions in health care markets in California relating to
20 acquisitions and affiliations, including, but not limited to, cost and
21 quality analysis.

22 (2) The Department of Justice shall make the report ~~publically~~
23 *publicly* available on its internet website.

24 (d) The board shall meet quarterly.

25 (e) (1) The board shall comply with the Bagley-Keene Open
26 Meeting Act (Article 9 (commencing with Section 11120) of
27 Chapter 1 of Part 1 of Division 3 of Title 2 of the Government
28 Code).

29 (2) The board shall comply with the California Public Records
30 Act (Chapter 3.5 (commencing with Section 6250) of Division 7
31 of Title 1 of the Government Code).

32 1190.10. (a) ~~Except as provided in subdivision (f), a health~~
33 ~~care-system~~ *system, private equity group, or hedge fund* shall
34 provide written notice to, and obtain the written consent of, the
35 Attorney General prior to an affiliation or acquisition between the
36 health care system and a health care facility or *provider, or between*
37 *the private equity group or hedge fund and a health care facility*
38 *or provider.* The notice shall contain information sufficient to
39 evaluate the nature of the acquisition or affiliation and information
40 sufficient for the Attorney General to determine that the criteria



1 set forth in paragraph (1) of subdivision (b) of Section 1190.25
2 have been met or that a waiver may be granted pursuant to
3 paragraph (2) of subdivision (d) of Section 1190.25.

4 (b) Within 60 days of receipt of the written notice required by
5 subdivision (a), the Attorney General shall do one of the following:

6 (1) Notify the health care ~~system~~ *system, private equity group,*
7 *or hedge fund* whether the Attorney General has cleared the
8 transaction as meeting the requirements of paragraph (1) of
9 subdivision (b) of Section 1190.25.

10 (2) Grant the health care ~~system~~ *system, private equity group,*
11 *or hedge fund* a waiver pursuant to paragraph (2) of subdivision
12 (d) of Section 1190.25.

13 (3) Issue a request for additional information from the parties
14 to the acquisition or affiliation.

15 (c) Within 45 days of certification by the Attorney General that
16 the parties to the acquisition or affiliation have substantially
17 complied with the request for additional information pursuant to
18 paragraph (3) of subdivision (b), the Attorney General shall grant
19 or deny consent pursuant to paragraph (1) of subdivision (b).

20 (d) The Attorney General may extend any time period set forth
21 in subdivision (b) or (c) by 14 days if the Attorney General decides
22 to hold a public meeting under subdivision (b) of Section 1190.30.

23 (e) The parties and the Attorney General may consent to extend
24 the time period in subdivision (c) by an additional 45 days if the
25 acquisition or affiliation is substantially changed or modified by
26 the parties prior to the expiration of the period in subdivision (c)
27 or the acquisition involves health care facilities, or providers,
28 servicing multiple communities.

29 (f) (1) *A health care system that is acquiring or affiliating with*
30 *a provider, group of providers, or health care facility for a*
31 *transactional value of five hundred thousand dollars (\$500,000)*
32 *or less shall provide written notice to the Attorney General. For*
33 *those notices, the Attorney General shall do one of the following*
34 *within 30 days:*

35 (A) *Notify the health care system that the Attorney General does*
36 *not object to the transaction.*

37 (B) *Notify the health care system that the Attorney General has*
38 *found the transaction to raise substantial competitive concerns*
39 *that may impact competition in the market such that the health*



1 care system, private equity group, or hedge fund is required to
2 comply with subdivision (a) of Section 1190.10.

3 (2) If, after 30 days, a health care system does not receive notice
4 pursuant to paragraph (1), the health care system may proceed
5 as if it received the notice of no objection pursuant to
6 subparagraph (A) of paragraph (1).

7 (g) The standard of review for the Attorney General to make
8 determinations pursuant to subdivision (f) is whether the
9 transaction presents substantial competitive concerns based on
10 an analysis of market shares of the provider, group of providers,
11 or health care facility in any relevant market, as set out in
12 subparagraph (A) of paragraph (2) of subdivision (b) of Section
13 1191.

14 1190.15. (a) The Health Advisory Policy Board, upon request
15 by the Attorney General or otherwise in its discretion, General,
16 may review a written notification submitted by a health care system
17 pursuant to Section 1190.10 and provide the Attorney General
18 with written information with regard to whether to grant or deny
19 consent to the affiliation or acquisition. The Attorney General may
20 consider the recommendation of the board.

21 (b) A member of the board shall not make, participate in making,
22 or in any way attempt to use the member's official position to
23 influence the making of a decision that the member knows or has
24 reason to know will have a reasonably foreseeable material
25 financial effect, distinguishable from its effect on the public
26 generally, on them or a member of their immediate family, or on
27 a business entity in which the member is a director, officer, partner,
28 trustee, employee, or holds any position of management.

29 1190.20. The Attorney General may adopt regulations to
30 implement this division, including, but not limited to, regulations
31 that extend the time periods in Section 1190.10, or regulations to
32 provide a process for requesting a waiver pursuant to Section
33 1190.25.

34 1190.25. (a) Except as provided in subdivision (b), the
35 Attorney General shall deny consent to an affiliation or acquisition
36 between a health care system, private equity group, or
37 hedge fund and a nonhospital health care facility, provider, or both,
38 unless the health care system, private equity group, or
39 hedge fund demonstrates that the affiliation or acquisition will
40 result in a substantial likelihood of clinical integration, a substantial



1 likelihood of increasing the availability and access of services to
2 an underserved population, or both.

3 (b) (1) The Attorney General may deny consent to an affiliation
4 or acquisition between a health care ~~system~~ *system, private equity*
5 *group, or hedge fund* and a ~~nonhospital~~ health care facility,
6 provider, or both, if there is a substantial likelihood of
7 anticompetitive effects that outweigh the benefits of a substantial
8 likelihood of clinical integration, a substantial likelihood of
9 increase in services to an underserved population, or both.

10 (2) A substantial likelihood of anticompetitive effects in
11 providing hospital or health care services shall include, but not be
12 limited to, a substantial likelihood of raising market prices,
13 diminishing quality, reducing choice, or diminishing availability
14 of, or diminishing access to, hospital or ~~nonhospital~~ health care
15 services.

16 (c) The Attorney General, in making a determination to grant
17 or deny consent pursuant to this section, shall apply the public
18 interest standard. The term “public interest” is defined as being in
19 the interests of the public in protecting competitive and accessible
20 health care markets for prices, quality, choice, accessibility, and
21 availability of *all* health care services for local communities,
22 regions, or the state as a whole. Acquisitions or affiliations shall
23 not be presumed to be efficient for the purpose of assessing
24 compliance with the public interest standard.

25 (d) (1) A health care ~~system~~ *system, private equity group, or*
26 *hedge fund* located in a rural area may request, in writing, a waiver
27 of the prohibition in subdivision (a).

28 (2) The Attorney General ~~shall~~ *may* grant a waiver if either of
29 the following conditions exist:

30 (A) The affiliation or acquisition would directly benefit
31 consumers of health care services in rural areas by improving the
32 access or availability of those services.

33 (B) The affiliation or acquisition is needed to improve the health,
34 safety, and well-being of consumers of health care services in rural
35 areas.

36 (3) *The Attorney General may adopt regulations regarding the*
37 *process of requesting a waiver and the conditions the health care*
38 *system, private equity group, or hedge fund must meet to obtain*
39 *that waiver.*



1 1190.30. (a) The Attorney General shall make the
2 determination required by Section 1190.25 in writing that provides
3 the basis for the determination.

4 (b) Prior to issuing a written determination pursuant to
5 subdivision (a), the Attorney General may hold a public meeting,
6 which may be held in any of the counties in which the acquisition
7 or affiliation will take place, to hear comments from interested
8 parties. Prior to holding a public meeting, the Attorney General
9 shall provide notice of the time and place of any meetings by
10 electronic publication, or publication in newspapers of general
11 circulation, to consumers that may be affected by the acquisition
12 or affiliation. If a substantive change or modification to the
13 acquisition or affiliation is submitted to the Attorney General after
14 a public meeting, the Attorney General may conduct an additional
15 public meeting to hear from interested parties with respect to the
16 change or modification. To the extent that a public meeting has
17 already occurred under Sections 5916 and 5922 of the Corporations
18 Code, the Attorney General may waive a subsequent meeting
19 requirement under this section.

20 (c) Any of the parties to the acquisition or affiliation may appeal
21 the Attorney General’s final determination by a writ of mandate
22 to the superior court pursuant to Section 1094.5 of the Code of
23 Civil Procedure.



24 1190.35. This division does not operate to alter, amend, modify,
25 invalidate, impair, or supersede any other law.

26 1190.40. If a health facility is subject to Section 5914 or 5920
27 of the Corporations Code, the review under those sections shall
28 be concurrent with the review under this division, to the extent
29 practicable.

30 1191. (a) It is unlawful for one or more health care systems,
31 either independently or dependently, to use their market power as
32 set forth in this section.



33 (b) The conduct of a health care system shall be unlawful
34 pursuant to subdivision (a) under any of the following conditions:

35 (1) The health care system has substantial market power in any
36 market for hospitals or nonhospital health care services and the
37 health care system’s conduct has a substantial tendency to cause
38 anticompetitive effects. A substantial likelihood of anticompetitive
39 effects in providing hospital or *nonhospital* health care services
40 shall include a substantial likelihood of raising market prices,

1 diminishing quality, reducing choice, increasing the total cost of
2 care, or diminishing availability of, or diminishing access to,
3 hospital or nonhospital health care services.

4 (2) The health care system shall be presumed to be acting
5 unlawfully if it has substantial market power in any market for
6 any service in trade or commerce and the health care system’s
7 conduct involves tying or exclusive dealing.

8 (A) A market for any service in trade or commerce may be the
9 state itself, northern California as comprised of the 48 northernmost
10 counties, southern California as comprised of all other counties in
11 the state, a county, a metropolitan statistical area as defined under
12 the United States Census, a micropolitan statistical area as defined
13 under the United States Census, a region in which insurance is
14 offered under Covered California pursuant to paragraph (2) of
15 subdivision (a) of Section 10753.14 of, or paragraph (2) of
16 subdivision (a) of Section 10965.9 of, the Insurance Code, or
17 paragraph (2) of subdivision (a) of Section 1357.512 or paragraph
18 (2) of subdivision (a) of Section 1399.855, or any other market
19 supported by the evidence.

20 (B) For purposes of this section, “tying” is defined as the seller
21 coercively conditioning the sale of one or more services on the
22 sale of a second distinct service or services if the arrangement
23 affects a more than trivial amount of sales of the second distinct
24 service or services. The conditioning can be explicit, implicit, or
25 as an economic imperative based on the pricing of those services.

26 (C) For purposes of this section, “exclusive dealing” ~~is defined~~
27 ~~as means~~ an agreement in which a health plan or employer who
28 buys health care services agrees implicitly or explicitly, whether
29 coerced or voluntarily, to buy services exclusively from a health
30 care system for a period of time. Exclusive dealing is presumed
31 to be anticompetitive for purposes of this section whether or not
32 pricing practices are a component of that conduct.

33 (c) Substantial market power can be shown in one of the
34 following two ways:

35 (1) The conduct had an actual substantial anticompetitive effect,
36 including, but not limited to, prices, quality, access, or availability
37 of services, choice, or total cost of care. For purposes of this
38 paragraph, “total cost of care” ~~is defined as means~~ the measurement
39 of direct and indirect costs, including, but not limited to, price and

1 utilization, associated with an episode of care for a period of health
2 care coverage.

3 (2) The health care system has a sufficiently substantial market
4 share in one or more markets for any service in trade or commerce
5 after accounting for barriers to entry to exercise substantial market
6 power in those markets. The health care system shall be presumed
7 to have substantial market power if, accounting for barriers to
8 entry, it has greater than a 60 percent market share. That
9 presumption shall not be rebuttable if it has greater than a 75
10 percent market share.

11 (d) Notwithstanding the other provisions of this section, a health
12 care system is not acting unlawfully if its conduct directly and
13 significantly benefits consumers of any services in that same
14 market in which the conduct is taking place, or the health care
15 system, and the conduct that it is committing, are located entirely
16 within a rural area as defined by subdivision (k) of Section 1190
17 1190, and if it otherwise meets the criteria of this section and all
18 of the following conditions exist:

19 (1) Any benefits are not achievable by less restrictive
20 alternatives.

21 (2) Any benefits substantially outweigh any actual or likely
22 anticompetitive effects of the conduct.

23 (3) No benefit is based on the need to meet a public federal,
24 state, or local requirement or mandate of any kind.

25 (e) The Attorney General may bring a civil action on behalf of
26 the state or of any of its political subdivisions or public agencies
27 or in the name of the people of the State of California, as *parens*
28 *patriae* on behalf of natural persons residing in the state, in the
29 superior court of any county that has jurisdiction over a defendant
30 for any violation of this section.

31 (f) ~~Any~~ A civil action to enforce ~~any~~ a cause of action for a
32 violation of this section shall be commenced within four years
33 after the cause of action accrued.

34 (g) Civil fines shall be imposed for a violation of this section
35 and those fines may be calculated either as one million dollars
36 (\$1,000,000) or as twice the gross gain to the health care system
37 or gross loss to any other party multiplied by two, whichever is
38 greater.

39 (h) The court shall award the state as monetary relief three times
40 the total damage sustained as described in subdivision (a), the



1 interest on the total damages, and the costs of suit, including a
2 reasonable attorney's fee.

3 (i) In any civil action brought by the Attorney General, the court
4 may, in addition to granting those prohibitory injunctions and other
5 restraints as it may deem expedient to deter the defendant from,
6 and insure against, committing a future violation of this section,
7 grant those mandatory injunctions as may be reasonably necessary
8 to restore and preserve fair competition in the trade or commerce
9 affected by the violation.

10 (j) Any fees or fines obtained should be deposited in the
11 Attorney General antitrust account within the General Fund.

12 (k) The Attorney General may adopt regulations further defining
13 provisions in this section.

14 (l) This section does not operate to alter, amend, modify,
15 invalidate, impair, or supersede any other law.

16 (m) *Notwithstanding any other law, this section does not impose*
17 *liability for the intracorporate actions of a health care system.*