HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 1243 Hospital or Group Practice Mergers, Acquisitions, and Other Transactions
SPONSOR(S): Appropriations Committee, Health Market Reform Subcommittee, Burton
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Market Reform Subcommittee	14 Y, 0 N	Gilani	Crosier
2) Appropriations Committee	29 Y, 0 N, As CS	Gusky	Pridgeon
3) Health & Human Services Committee			

SUMMARY ANALYSIS

Healthy competition in economic markets keeps prices low and quality high for consumers. When one entity becomes too strong, it can stifle competition, leading to higher prices and harm to consumers. The goal of antitrust law is to protect and foster competition in economic markets. It is based on the idea that an unregulated market can lead to coercive monopolies.

When large hospitals systematically acquire smaller physician practices—a process known as vertical integration—such transactions can lead to fewer healthcare providers and less competition, and sometimes, coercive monopolies. To prevent such a transaction from occurring, a plaintiff, often the Attorney General, may bring an antitrust suit against the hospital. If a merger or acquisition violates antitrust law, a court may order the transaction undone, or "unwound." It is difficult for the Office of the Attorney General (OAG) to address antitrust activity once a transaction has occurred. However, Florida law does not require parties to such potentially monopolistic transactions to notify the OAG prior to execution.

CS/CS/HB 1243 amends the Florida Antitrust Act relating to the acquisition of hospitals or group practices in the health care market. The bill imposes certain reporting requirements when a transaction between two entities in the health care market results in an affiliation or a material change to the health care market which could create a monopoly. An entity that fails to comply with these reporting requirements is subject to a civil penalty up to $500,000.

These new notice requirements will provide a mechanism for the OAG to review transactions before they are occur and will allow the OAG time to determine whether a proposed transaction has antitrust implications and if warranted, pursue action to prevent coercive monopolies from forming in the health care market.

The bill also addresses invalid restrictive covenants, or non-compete clauses, as they relate to monopolies on physician specialties in the health care market. Specifically, when one entity has a monopoly on all of the physicians who practice a certain medical specialty in one county, the bill makes non-compete clauses with physicians of that specialty void and unenforceable until 3 years after another entity enters the market and begins offering that medical specialty to the patients of that county.

The bill will have a significant fiscal impact on the Office of the Attorney General. CS/CS/HB 1243 provides an appropriation to implement the provisions of the bill. *See* Fiscal Analysis.

The bill provides an effective date of July 1, 2019.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Federal Antitrust Law

Healthy competition in economic markets keeps prices low and quality high for consumers. When one entity becomes too strong, it can stifle competition, leading to higher prices and harm to consumers.

Antitrust law exists to protect competition, but not necessarily individual competitors, in economic markets. It is based on the idea that an unregulated market will lead to the creation of coercive monopolies.[1] Federal antitrust law includes the Sherman Antitrust Act, the Clayton Act, and the Federal Trade Commission Act. These laws are enforced in federal district court[2] by the U.S. Department of Justice, the Federal Trade Commission, state Attorneys General, and private plaintiffs. Antitrust case law is well-developed, and it is often difficult to distinguish aggressive, pro-competitive conduct—which is legal—from predatory, anti-competitive conduct.[3]

Clayton Act

The Clayton Act[4] prohibits specific business actions, including mergers and acquisitions, which may substantially lessen competition. To determine whether a merger violates the Clayton Act, a court must decide whether the merger is likely to create an appreciable danger of anticompetitive effects. The plaintiff must establish a prima facie case that a transaction is anticompetitive, such as by showing that an acquisition will significantly increase market concentration and lessen competition.[5] The burden then shifts to the defendant to rebut the prima facie case, such as by introducing evidence casting doubt on the plaintiff's prediction of anticompetitive effects.[6] If the defendant rebuts the prima facie case, the plaintiff has the final burden to demonstrate an antitrust violation.[7] If the plaintiff prevails, the customary remedy is for the court to order divestiture and unwind the merger.[8]

Sherman Antitrust Act

The Sherman Antitrust Act[9] prohibits any attempt to restrain trade or form a monopoly. A monopoly has two elements: (1) monopoly power and (2) willful acquisition or maintenance of that power, as opposed to power naturally resulting from a superior product, acumen, or historic accident. Stated differently, a plaintiff must prove the defendant acquired the monopoly power in a "predatory" manner. Penalties for violating the Sherman Act include up to ten years' imprisonment and a fine up to $100 million for a corporation or $1 million for any other person.[10]

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[1] John J. Miles, Antitrust Primer, 20140513 AHLA Seminar Papers 1 (2014) (stating the purpose of antitrust law is to "protect and promote competition as the primary method by which this country allocates scarce resources to maximize the welfare of consumers.").
[2] Steven Fox, Litigation Under Florida's Deceptive and Unfair Trade Practices Act, the Florida Antitrust Act, or Federal Antitrust Statutes, The Florida Bar, Business Litigation in Florida (2017) (federal district courts have exclusive jurisdiction over federal antitrust actions).
[3] Animesh Ballabh, Antitrust Law: An Overview, 88 J. Pat. & Trademark Off. Soc'y 877 (2006); John J. Miles, Antitrust Primer, 20140513 AHLA Seminar Papers 1 (2014).
[4] 15 U.S.C. s. 18.
[5] *Olin Corp. v. FTC*, 986 F.2d 1295, 1305 (9th Cir. 1993) (discussing how plaintiff's establishment of a prima facie case on statistical evidence is first step in analysis); *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008).
[6] Id.
[7] *Chicago Bridge & Iron*, 534 F.3d at 423.
[8] *St. Alphonsus Med. Ctr. v. St. Luke's Health Sys.*, 778 F.3d 775, 792 (9th Cir. 2015).
[9] 15 U.S.C. ss. 1 et seq.
[10] 15 U.S.C. s. 1.

Florida Antitrust Law

Florida Antitrust Act of 1980

The Florida Antitrust Act of 1980[11] (the Act) is intended to complement federal antitrust law in order to foster effective competition. The Act essentially mirrors the federal Sherman Act, and prohibits:[12]

- Every contract, combination, or conspiracy in restraint of trade or commerce;[13] and
- Monopolization or attempted monopolization of any part of trade or commerce.[14]

A violation of Florida antitrust law can be penalized with up to three years' imprisonment and fines up to $1 million for a corporation and $100,000 for any other person.[15] There is also a private right of action for any person injured by certain violations.[16]

Florida Deceptive and Unfair Trade Practices Act (FDUTPA)

The FDUTPA broadly prohibits any unfair or deceptive act or practice committed in the conduct of any trade or commerce.[17] It provides a cause of action to make consumers whole for losses caused by fraudulent consumer practices. The FDUTPA applies to actions that do not yet constitute full-blown antitrust violations;[18] thus, an antitrust violation is also an unfair method of competition under the FDUTPA.[19] A willful violation of the FDUTPA is subject to a fine up to $10,000.[20]

Florida law does not provide a corollary to the federal Clayton Act, which specifically targets mergers and acquisitions that may lessen competition. However, the Attorney General considers the Florida Antitrust Act of 1980 and the FDUTPA broad enough to encompass those types of violations.[21]

Vertical Integration

When large hospitals or other medical facilities merge with one another or systematically acquire smaller physician practices, such transactions can lead to fewer healthcare providers and less competition, and sometimes, coercive monopolies.

Vertical integration broadly refers to transactions whereby a large medical entity, such as a hospital, acquires a smaller medical entity, such as a physician practice group, thereby expanding the hospital's market power. Vertical integration can occur in many ways, including by the following methods:

- **Complete buyout.** A hospital buys out a physician practice, including its physicians, staff, equipment, and patients. The physicians become hospital employees.
- **Asset purchase agreement.** A hospital acquires from a physician practice its channels of distribution, laboratories, equipment, or other assets.
- **Physician enterprise model.** A hospital and a physician practice enter into non-equity joint ventures together. The physicians preserve their autonomy and private practice model.[22]

[11] Ss. 542.15 – 542.36, F.S.
[12] S. 542.16, F.S.
[13] S. 542.18, F.S.
[14] S. 542.19, F.S.
[15] S. 542.21, F.S.
[16] Ss. 542.21, 542.22, F.S.
[17] Ss. 501.201 – 501.213, F.S.
[18] Steven Fox, *Litigation Under Florida's Deceptive and Unfair Trade Practices Act, the Florida Antitrust Act, or Federal Antitrust Statutes*, THE FLORIDA BAR, Business Litigation in Florida (2017).
[19] Id.; *see Omni Healthcare, Inc. v. Health First, Inc.*, *not reported in* F.Supp.3d (2016).
[20] S. 501.2075, F.S.
[21] *Supra* note 18; FLORIDA ATTORNEY GENERAL, *Antitrust*, http://myfloridalegal.com/antitrust (last visited Mar. 15, 2019).
[22] John W. McDaniel, *The Physician Enterprise Model: A Nonemployment Alternative*, ACMPE Executive View, Vol. 8, No. 1 (Spring 2012).

- **Group practice subsidiary model.** A hospital purchases a physician practice group, but the physicians, who are not employed directly by the hospital, maintain control of the day-to-day operations of the practice group.[23]
- **Professional service agreement.** A hospital purchases a physician practice's technical component services and compensates the practice's physicians for professional services at the practice. The practice remains intact, while the hospital bills and collects professional fee-for-service revenue. The hospital compensates the practice for the services.[24]

Vertical integration has been on the rise in the last twenty years. Between 2002 and 2008 in the U.S., the share of physician practices owned by hospitals doubled,[25] and trends towards increased vertical integration continued from 2007 to 2013.[26] Whether the trend towards vertical integration benefits consumers is heavily debated.[27] Proponents of vertical integration argue that it can improve the quality and efficiency of care by strengthening ties between physicians and hospitals and improving communication.[28]

Critics of vertical integration argue that it increases a hospital's market share, potentially reducing or eliminating competition. Removing competition in the medical marketplace, in turn, may allow hospitals to raise their prices to a level that harms consumers.[29] Vertical integration may lead to:[30]

- Hospitals increasing their market power by amassing control over a larger bundle of services;
- Hospitals depriving their rivals of a source of destination for referrals; and
- Heightened incentives for physicians to supply unnecessary treatments to pay for kickbacks for inappropriate referrals.

The *Health Affairs Journal* studied the trends and effects of vertical integration in the U.S. and found that some loose forms of vertical integration might be socially beneficial. However, the study concluded that vertical integration causes increased healthcare costs:[31]

> Taken together, our results provide a mixed, although somewhat negative, picture of vertical integration from the perspective of the privately insured. Our most definitive finding is that hospital ownership of physician practices leads to higher prices and higher levels of hospital spending.

Similarly, a recent study by the *Journal of Health Economics* found that hospital acquisitions of physician practices were responsible for an average price increase of 14.1% in fees for physician services, with larger increases where the acquiring hospital was more dominant within its market.[32] The price increases varied across specialties, ranging from a 15% price increase for primary care physicians up to a 33.5% price increase for cardiologists.

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[23] PHYSICIANS PRACTICE, *Maintaining Independence as a Group Practice Subsidiary*, https://www.physicianspractice.com/maintaining-independence-group-practice-subsidiary (last visited Mar. 15, 2019).
[24] Marti Cox, *Physician-Hospital Alignment Models: An Evolving Lexicon*, MGMA, https://www.mgma.com/resources/resources/business-strategy/physician-hospital-alignment-models-an-evolving-l (last visited Mar. 15, 2019); CBIZ, *Professional Services Agreement: An Alternative Strategy to Hospital Employment*, https://www.cbiz.com/insights-resources/details/articleid/3197/ispreview/true/professional-services-agreement-an-alternative-strategy-to-hospital-employment-article (last visited Mar. 15, 2019).
[25] Laurence C. Baker, M. Kate Bundorf, and Daniel P. Kessler, *Vertical Integration: Hospital Ownership of Physician Practices is Associated with Higher Prices and Spending*, HEALTH AFFAIRS (May 2014), available at: https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2013.1279 (last visited Mar. 15, 2019).
[26] Cory Capps, David Dranove, and Christopher Ody, *The Effect of Hospital Acquisitions of Physician Practices on Prices and Spending*, JOURNAL OF HEALTH ECONOMICS (Apr. 22, 2018), https://www.sciencedirect.com/science/article/abs/pii/S016762961730485X (last visited Mar. 14, 2019).
[27] *Supra* note 25.
[28] Id.
[29] Id.
[30] Id.
[31] Id.
[32] *Supra* note 26.

The study estimated nearly half of the price increases were due to the exploitation of "facility fees," which hospitals are allowed to charge for procedures performed by hospital-owned physician groups.[33] When hospitals acquire physician practices, the simple change in ownership allows them to charge higher prices for the same procedure regardless of whether the procedure is performed in the hospital or in the physician's practice. The study found that the cardiologist specialty had the sharpest increase in vertical integration and prices, suggesting that more hospitals are acquiring cardiologists because of the higher reimbursement incentives for facility fees in that specialty. The study concluded:[34]

> Overall, we believe these results paint a relatively negative picture of hospital-physician VI [vertical integration]. However, given the evolving nature of healthcare reimbursement systems, future analyses will be important.

Antitrust Enforcement Mechanisms in Medical Markets

A plaintiff, such as the Attorney General, may bring an antitrust suit to prevent a merger or acquisition in the medical market.[35] If a merger or acquisition violates antitrust law, a court may order the transaction undone, or "unwound," or the court may order other remedies.[36]

For example, in *St. Alphonsus Medical Center v. St. Luke's Health System*, 778 F.3d 775 (9th Cir. 2015), an Idaho hospital purchased independent physician groups, resulting in the combined entity capturing 80% of the primary care physicians in the geographic market. Two medical centers and the FTC sued the acquiring hospital under state and federal antitrust law. The Court analyzed the transaction and found that while the intent of the acquisition may have been to improve patient outcomes, the acquisition would likely have anticompetitive effects and must be unwound under the Clayton Act.[37]

Under current law, a hospital's acquisition of a physician practice may be challenged by:

- The FTC[38] under the federal Clayton Act;[39]
- A private plaintiff under the FDUTPA; or
- The Attorney General under the Florida Antitrust Act.[40]

However, there is no reporting mechanism in current law that would alert the Attorney General to such acquisitions or transactions.

Restrictive Covenants

A restrictive covenant, commonly referred to as a "non-compete clause," is a clause in a contract which prohibits an employee from competing with the ex-employer for a period of time after leaving the business. A restrictive covenant may also prohibit the ex-employee from soliciting or dealing with customers of the business.

In general, s. 542.18, F.S., makes it unlawful for any contract to restrain trade or commerce in this state. However, the Legislature has recognized that certain restraints of trade or commerce are valid

[33] Id.
[34] Id.
[35] *See, e.g., St. Alphonsus Med. Ctr. v. St. Luke's Health Sys.*, 778 F.3d 775 (9th Cir. 2015) (where two hospitals merged, FTC and private plaintiffs brought antitrust suit, and court ordered divestiture of merger).
[36] *See id.*
[37] Id.
[38] *See, e.g., id.*; *F.T.C. v. Hosp. Bd. of Directors of Lee Cnty.*, 38 F.3d 1184 (11th Cir. 1994).
[39] *See also F.T.C. v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991) (ruling against proposed acquisition of one hospital by another under the Clayton Act).
[40] S. 542.27(2), F.S., the Attorney General may institute any action authorized under federal laws pertaining to antitrust or restraints of trade.

when they support a legitimate business interest.[41] Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable. A legitimate business interest includes, but is not limited to the following:[42]

- Trade secrets[43] as defined in s. 688.002(4).
- Valuable confidential business or professional information that otherwise does not qualify as trade secrets.
- Substantial relationships with specific prospective or existing customers, patients, or clients.
- Customer, patient, or client goodwill associated with:
  - An ongoing business or professional practice, by way of trade name, trademark, service mark, or "trade dress";
  - A specific geographic location; or
  - A specific marketing or trade area.
- Extraordinary or specialized training.

To be valid and enforceable, such restrictive covenants must be reasonable in time, area, and line of business.[44] An entity seeking to enforce a restrictive covenant has the burden of proving that the contractually specified restraint is reasonably necessary to protect a legitimate business interest or interests justifying the restriction.[45] If the entity is able to establish a prima facie case that the restraint is reasonably necessary, then the burden shifts to the opponent to establish that the contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary. If the opponent is successful in proving this, then the court must modify the restraint, but only to the extent reasonably necessary to still protect the legitimate business interest.[46]

Section 542.335, F.S., creates presumptions of reasonable and unreasonable time periods for restrictive covenants based on the type of legitimate business interest justifying the restraint. If the legitimate business interest is protection of a trade secret, a restraint of up to 5 years is presumed reasonable.[47] For other types of legitimate business interests, the presumptions of reasonable restraints range from 6 months to 3 years in duration.[48]

While the Florida Antitrust Act explicitly addresses valid restrictive covenants and legitimate business interests, it does not similarly address invalid restrictive covenants or business interests that would not be considered legitimate under antitrust law.

Restrictive Covenants in the Health Care Market

Hospitals and physician group practices often use restrictive covenants to prevent physicians from working in the same geographical area for a certain period of time after they leave employment or their contract term ends.[49] This means that physicians either have to move to a different geographic location to continue practicing or cannot continue to treat their patients even if the patients would like to maintain the patient-physician relationship.

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[41] S. 542.335, F.S.
[42] S. 542.335(1)(b), F.S.
[43] S. 688.002(4), F.S., defines a "trade secret" as information, including a formula, pattern, compilation, program, device, method, technique, or process that: derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
[44] S. 542.335(1), F.S.
[45] S. 542.335(1)(c), F.S.
[46] S. 542.335(1)(c), F.S.
[47] S. 542.335(e), F.S.
[48] S. 542.335(d), F.S.
[49] Paula Berg, *Judicial Enforcement of Covenants Not to Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense*, 45(1) RUTGERS LAW REV. 1-48 (1992), available at: https://academicworks.cuny.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1310&context=cl_pubs (last visited Apr. 2, 2019); *See also,* Robert Horton, Esq., and Justin Page, Esq., *Restrictive Covenants in Physician Employment Relationships*, AMERICAN HEALTH LAWYERS ASSOCIATION, Member Briefing, July 2010, available at: https://www.bassberry.com/wp-content/uploads/AHLANonCompeteJuly2010.pdf (last visited Apr. 2, 2019).

One survey found that approximately 45 percent of physicians in group practices have restrictive covenants in their employment contracts.[50] The American Medical Association discourages the use of restrictive covenants in the practice of medicine, finding that they restrict competition, disrupt continuity of care, and limit patient access to care.[51]

The federal Departments of Health and Human Services, the Treasury, and Labor, and the Federal Trade Commission have also identified restrictive covenants in the health care industry as one of the drivers of increased health care costs and decreased competition, and recommend that states scrutinize these restrictive covenants, particularly how they impact patient access to care and the supply of providers.[52]

Effect of Proposed Changes

Notice of Hospital and Group Practice Transactions

CS/CS/HB 1243 amends the Florida Antitrust Act relating to the acquisition of hospitals or group practices in the health care market. The bill imposes certain reporting requirements when a transaction between two entities in the health care market results in an affiliation or a material change to the health care market which could create a monopoly. Any entity that fails to comply with these reporting requirements is subject to a civil penalty up to $500,000.

It is difficult for the Office of the Attorney General (OAG) to address antitrust activity once a transaction has occurred. These new notice requirements will provide a mechanism whereby the OAG will be able to review transactions before they are effective and will allow the OAG time to determine whether a proposed transaction has antitrust implications and if warranted, pursue action to prevent coercive monopolies from forming in the health care market.

Transactions Requiring Federal Reporting

Currently, when an entity operating in Florida reports a proposed merger or acquisition to the Federal Trade Commission or the United States Department of Justice under the federal Clayton Act, there is no requirement that Florida's Attorney General be notified. In these instances, the bill requires the entity to notify the OAG when it files any such report with the federal government. The notice must include:

- A description of the proposed relationship among the parties.
- The name, license number, and specialty of each physician in the group practice that is the subject of the proposed transaction.
- The name of each business entity that will provide services after the effective date of the transaction.
- The address for each location where such services will be provided.
- A description of services that will be provided at each location.
- The primary service area to be served by each location.
- A description of any prior transactions in the last 5 years that have resulted in a material change, including any change to the primary service area.

[50] Kurt Lavetti, et al., *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians,* 54(1) J. HUMAN RESOURCES (Feb. 2019), available at: http://kurtlavetti.com/UIPNC_vf.pdf (last visited Apr. 2, 2019).
[51] AMERICAN MEDICAL ASSOCIATION, *Restrictive Covenants*, https://www.ama-assn.org/delivering-care/ethics/restrictive-covenants (last visited Apr. 2, 2019), Code of Medical Ethics Opinions 11.2.3.1: Physicians should not enter into covenants that unreasonably restrict the right of a physician to practice medicine for a specified period of time or in a specified geographic area on termination of a contract and do not make reasonable accommodations for patients' choice of physician.
[52] *Reforming America's Healthcare System Through Choice and Competition*, U.S. DEP'T OF HEALTH & HUMAN SERVICES, U.S DEP'T OF THE TREASURY, DEP'T OF LABOR, AND FEDERAL TRADE COMMISSION, Dec. 3, 2018, available at: https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.pdf (last visited Apr. 2, 2019).

The OAG may then issue a civil investigative demand[53] for a copy of all materials submitted to the federal government and may request any additional information to determine whether the merger or acquisition violates Florida's antitrust laws.

Transactions Resulting in Material Change

Under the bill, a "material change" means any of the following:

- A merger, consolidation, or affiliation.
- The employment of all or substantially all of the physicians of a group practice.
- The acquisition of all or substantially all of: the properties and assets of a group practice; the capital stock, membership interests, or other interests of a group practice; or one or more insolvent practices.

When a group practice, hospital, or hospital system enters into a transaction that results in a material change to another group practice of four or more physicians, it must submit written notice to the OAG at least 90 days before the effective date of the transaction. The notice must include:

- A description of the proposed relationship among the parties.
- The name, license number, and specialty of each physician in the group practice that is the subject of the proposed transaction.
- The name of each business entity that will provide services after the effective date of the transaction.
- The address for each location where such services will be provided.
- A description of services that will be provided at each location.
- The primary service area to be served by each location.
- A description of any prior transactions in the last 5 years that have resulted in a material change, including any change to the primary service area.

When submitting this notice, the entity must identify any information that is a trade secret as defined in statute so that it can be protected from further disclosure. The OAG may request additional information or issue a civil investigative demand for other documents or information relevant to antitrust investigations.

Transactions Resulting in an Affiliation

Under the bill, "affiliation" means a relationship between two or more entities that allows them to jointly negotiate with one or more other parties for professional medical services or reduces the primary service area in which any of the entities provides medical services. The primary service area is the region which accounts for 75 percent of an entity's patients.

When a hospital or hospital system enters into a transaction that results in an affiliation with another hospital or hospital system, each party to the transaction must submit written notice to the OAG at least 90 days before the effective date of the transaction. The notice must include:

- A description of the proposed relationship among parties to the proposed affiliation.
- The name of each business entity that will provide services after the effective date of the transaction.
- The address for each location where such services will be provided.
- A description of services to be provided at each location.
- The primary service area to be served by each location.

[53] S. 542.28, F.S., give the OAG authority to issue civil investigative demands, essentially a subpoena, for copies of any documents or information relevant to a civil antitrust investigation.

When submitting this notice, each entity must identify any information that is a trade secret as defined in statute so that it can be protected from further disclosure. The OAG may request additional information or issue a civil investigative demand for other documents or information relevant to antitrust investigations.

The bill requires the Attorney General to biennially report to the Legislature on its activities under this new section of law, beginning January 1, 2020.

Restrictive Covenants

The bill creates a section of law to explicitly address invalid restrictive covenants as they relate to monopolies on physician specialties in the health care market. Specifically, if an entity that controls all of the physicians who practice a certain medical specialty in one county enters into a restrictive covenant with a physician who practices that same specialty in that county, then that restrictive covenant does not support a legitimate business interest and is deemed void and unenforceable. This would prevent entities from having a monopoly on that medical specialty in that county and would allow physicians to continue treating patients in that county even after leaving employment with that hospital or practice.

Under the bill, the restrictive covenant remains void and unenforceable until 3 years after another entity enters the market in that county and begins offering that medical specialty. This will allow competitors that enter the market time to establish their practices and provide meaningful choice of providers to patients.

The bill is effective July 1, 2019.

B. SECTION DIRECTORY:

Section 1: Creates s. 542.275, F.S., relating to notice of certain hospital or group practice acquisitions; reporting.
Section 2: Creates s. 542.336, F.S., relating to invalid restrictive covenants.
Section 3: Provides an appropriation.
Section 4: Provides an effective date of July 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill establishes a civil penalty which must be deposited in the Legal Affairs Revolving Trust Fund. To the extent that the OAG imposes such penalties, it will experience an increase in revenue.

2. Expenditures:

   The bill will have a significant negative fiscal impact on the OAG, some of which may be offset by the civil penalty established by the bill. To implement the requirements of the bill, the OAG will need 7 attorneys with antitrust or health care experience, 3 financial analysts or health economists, and 2 legal assistants, and additional funding to cover travel, administrative, and technology costs, totaling $1,344,002 in the first year and $1,295,718 thereafter.[54] CS/CS/HB 1243 provides 12 full-time positions, associated salary rate, $1,295,718 of recurring and $48,284 of nonrecurring general

[54] Florida Department of Legal Affairs, Impact Analysis for 2019 HB 1243, pp. 3-4 (Mar. 15, 2019)(on file with Health Market Reform Subcommittee staff).

revenue funds to the Attorney General's Anti-Trust Division to implement the provisions of s. 542.275, Florida Statutes.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent that the OAG discovers anticompetitive behavior under the new notice requirements of the bill, hospitals, hospital systems, or group practices engaging in such behavior will no longer be able to acquire and control monopolistic shares of the market. To the extent that the OAG is successful in reducing health care monopolies in the state, smaller or independent hospitals or group practices will be able to continue operating independently and may offer competitive prices for health care to patients.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The OAG does not require rulemaking authority to implement the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 2, 2019, the Appropriations Committee adopted two amendments that:

- Provides 12 full-time positions, associated salary rate, $1,295,718 of recurring and $48,284 of nonrecurring general revenue funds to the Attorney General's Anti-Trust Division to implement the provisions of s. 542.275, Florida Statutes.
- Makes certain restrictive covenants void and unenforceable for a certain period of time.

The bill was reported favorably as a committee substitute. This bill analysis is drafted to the committee substitute as passed by the Appropriations Committee.