The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Health Policy

BILL:	SB 1064
INTRODUCER:	Senator Brodeur
SUBJECT:	Hospital, Hospital System, or Provider Organization Transactions
DATE:	March 9, 2021
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Brown	HP	**Pre-meeting**
2.			JU	
3.			AP	

I. Summary:

SB 1064 creates s. 542.275, F.S., to require hospitals, hospital systems, and other specified provider organizations to provide a written report to the Office of the Attorney General (AG) concurrently with its report to the federal government when required to report under the Hart-Scott-Rodino Antitrust Improvements Act[1] (Act) or at least 90 days prior to a transaction that will result in a material change, as defined by the bill, if not required to report by the Act. The bill specifies what information must be included in the written report and authorizes the AG to request additional information or to issue a civil investigative demand under s. 542.28, F.S.

The bill requires the AG to provide a biennial report, beginning on Jan. 1, 2022, to the Legislature regarding its review of transactions under the provisions of the bill and provides for up to a $500,000 civil penalty for organizations who fail to report when required by the bill.

The bill also creates two unnumbered sections of Florida law to:

- Specify that the AG may engage consultants, experts, accountants, economists, analysts, and other assistants to aid in any review conducted under the bill. The reasonable expenses related to such services must be paid by the parties to the transaction under review; and
- To allow the Department of Legal Affairs (DLA) to hire 12 full-time equivalent (FTE) positions with the associated salary rate of 629,382 and to appropriate $1,221,249 in recurring and $47,472 in nonrecurring funds from general revenue for the purpose of implementing the bill.

The bill provides an effective date of July 1, 2021.

[1] 15 U.S.C. s. 18a(a)

II. Present Situation:

Federal Antitrust Laws

Congress passed the first antitrust law, the Sherman Act, in 1980 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act, which created the FTC, and the Clayton Act. With some revisions, these are the three core federal antitrust laws still in effect today.[2]

The Sherman Act

The Sherman Act outlaws "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize." The Sherman Act does not prohibit every restraint of trade, only those that are unreasonable. For instance an agreement between two individuals to form a partnership may restrain trade, but may not do so unreasonably, and thus may be lawful under the antitrust laws. On the other hand, certain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These acts are "per se" violations of the Sherman Act; in other words, no defense or justification is allowed.[3]

The penalties for violating the Sherman Act can be severe. Although most enforcement actions are civil, the Sherman Act is also a criminal law, and individuals and businesses that violate it may be prosecuted by the U.S. Department of Justice (DOJ). Criminal prosecutions are typically limited to intentional and clear violations, such as when competitors fix prices or rig bids. The Sherman Act imposes criminal penalties of up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison. Under federal law, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over $100 million.[4]

The Federal Trade Commission Act

The Federal Trade Commission Act bans "unfair methods of competition" and "unfair or deceptive acts or practices." The Supreme Court has said that all violations of the Sherman Act also violate the FTC Act. Thus, although the Federal Trade Commission (FTC) does not technically enforce the Sherman Act, it can bring cases under the FTC Act against the same kinds of activities that violate the Sherman Act. The FTC Act also reaches other practices that harm competition but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act. Only the FTC brings cases under the FTC Act.[5]

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[2] *The Antitrust Laws*, Federal Trade Commission, *available at* https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws, (last visited on Feb. 25, 2021).
[3] Id.
[4] Id.
[5] Id.

The Clayton Act

The Clayton Act addresses specific practices that the Sherman Act does not clearly prohibit, such as mergers and interlocking directorates (the same person making business decisions for competing companies). Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." As amended by the Robinson-Patman Act of 1936, the Clayton Act also bans certain discriminatory prices, services, and allowances in dealings between merchants. The Clayton Act was amended again in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act to require companies planning large mergers or acquisitions to notify the government of their plans in advance. The Clayton Act also authorizes private parties to sue for triple damages when they have been harmed by conduct that violates either the Sherman or Clayton Act and to obtain a court order prohibiting the anticompetitive practice in the future.[6]

The Hart-Scott-Rodino Antitrust Improvement Act

The Act, which was passed in 1976 and became effective in 1978 upon final passage of implementing rules, requires that parties to certain mergers or acquisitions must notify the Federal Trade Commission (FTC) and the federal Department of Justice (DOJ) before consummating the proposed acquisition.[7] The parties to the transaction must wait a specific period of time, usually 30 days, to allow the enforcement agencies to review the proposed transaction.[8] If, during the review, either the FTC or the DOJ determine that further inquiry is necessary, the agency may request additional information or documents from the parties, which extends the waiting period, usually by an additional 30 days.[9] Additionally, if the reviewing agency believes that the proposed transaction may violate antitrust laws, it may seek an injunction from federal district court to prohibit the consummation of the transaction.[10]

Whether a particular acquisition is subject to these requirements depends on the value of the acquisition and the size of the parties, as measured by their sales and assets. Small acquisitions, acquisitions involving small parties, and other classes of acquisitions that are less likely to raise antitrust concerns are excluded from the Act's coverage.[11] As a general matter, the Act and the rules require both acquiring and acquired persons to file notifications under the Act if all of the following conditions are met:

- As a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, non-controlling interests (NCI), and/or assets of the acquired person valued in excess of $200 million (as adjusted) , regardless of the sales or assets of the acquiring and acquired persons; or
- As a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, NCI, and/or assets of the acquired person valued in excess of $50 million (as adjusted) but less than $200 million; and

[6] *Supra* note 2.
[7] *What is the Premerger Notification Program: An Overview*, FTC Premerger Notification Office, revised March 2009, p. 1 *available at* https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf, (last visited February 25, 2021).
[8] Id.
[9] Id.
[10] Id.
[11] Id.

- One person has sales or assets of at least $100 million (as adjusted); and
- The other person has sales or assets of at least $10 million (as adjusted).

Florida Antitrust Statutes

The Florida Antitrust Act of 1980

Florida law also provides protections against anticompetitive practices. Chapter 542, F.S., short-titled the Florida Antitrust Act of 1980, has a stated purpose to complement the body of federal law prohibiting restraints of trade or commerce in order to foster effective competition.[12] The chapter outlaws "every contract, combination, or conspiracy in restraint of trade or commerce" in the state[13] and any person from monopolizing or attempting or conspiring to monopolize any part of trade.[14]

The chapter specifies that its provisions be liberally construed to accomplish its beneficial purpose[15] but exempts any activity or conduct otherwise exempt under Florida statutory or common law, exempt under federal antitrust laws,[16] and the chapter provides the contracts in restraint of trade are valid[17] as well as certain specified acts which may restrain trade.[18] The chapter provides both criminal and civil penalties for violating its provisions[19] and allows suits for damages to be instigated by injured parties.[20] The chapter also provides enforcement authority to the AG[21] and allows the AG and the state attorneys to serve civil investigative demands in furtherance of its enforcement authority.[22]

The Health Care Community Antitrust Guidance Act

Specific to health care, s. 408.18, F.S., allows any member of the health care community[23] to request a review of proposed business activity by the AG and request in writing that the AG issue an antitrust no-action letter. The AG may seek whatever documentation, data, or other material it deems necessary to conduct its review, and the parties are under an affirmative obligation to make a full, true, and accurate disclosure with respect to the activities for which the antitrust no-action letter is requested. The AG has 90 days to complete its review and, at the completion of the review, the AG may issue the no-action letter, decline to issue any type of letter, or take another position or action as it considers appropriate.

[12] Section 542.16, F.S.
[13] Section 542.18, F.S.
[14] Section 542.19, F.S.
[15] *Supra.* note 12.
[16] Section 542.20, F.S.
[17] Section 542.33, F.S.
[18] Section 542.335, F.S.
[19] Section 542.21, F.S.
[20] Section 542.22, F.S.
[21] Section 542.27, F.S.
[22] Section 542.28, F.S.
[23] Defined as all licensed health care providers, insurers, networks, purchasers, and other participants in the health care system. *See* s. 408.18(3)(a), F.S.

III. Effect of Proposed Changes:

SB 1064 creates s. 542.275, F.S., to require hospitals, hospital systems, and other provider organizations conducting business in Florida to notify the AG concurrently when required to provide a notice to the Federal Government under the Hart-Scott-Rodino Antitrust Improvements Act, or at least 90 days before the effective date of any transaction that would result in a material change, as defined in the bill, that is not required to be reported under the Act. The bill defines the following terms:

- "Acquisition" means an agreement, arrangement, or activity that results in a hospital, hospital system, or provider organization, directly or indirectly, obtaining control of another hospital, hospital system, or provider organization, including, but not limited to, the acquisition of voting securities and non-corporate interests, such as assets, capital stock, membership interests, or equity interests.
- "Contracting affiliation" means a relationship between two or more entities wherein the entities have the ability to negotiate jointly with payors over rates for health care services, or one entity negotiates on behalf of the other entity with payors over rates for professional medical services in the primary service area in which the entities operate. The term does not include arrangements among entities under common ownership.
- "Health care provider" means a physician licensed under chapters 458, 459, 460, or 461, F.S., or a person licensed under ch. 463, F.S., or a dentist licensed under ch. 466, F.S.
- "Hospital" has the same meaning as provided in s. 395.002, F.S.
- "Hospital system" means:
  - A corporation that owns one or more hospitals and any entity affiliated with such corporation through ownership or control; or
  - A hospital and any entity affiliated with such hospital through ownership.
- "Material change" means a merger, acquisition, or contracting affiliation that generates a combined revenue of $50 million or more between two or more entities of the following types:
  - Hospitals;
  - Hospital systems; or
  - Provider organizations.
- "Payor" means any entity or person that negotiates or assumes financial responsibility for a defined set of benefits from a health insurance plan or health insurance program. The term includes, but is not limited to, federal, state, and local governmental entities or agencies; affiliates; health insurance companies; health maintenance organizations; insurers; nonprofit religious organizations; persons; preferred provider organizations; prepaid limited health service organizations; and third-party administrators.
- "Primary service area" means the geographic area measured by the fewest number of zip codes from which the hospital, hospital system, or provider organization draws at least 75 percent of its patients.
- "Provider organization" means a corporation, a partnership, a business trust, an association, or an organized group of persons, whether incorporated or not, which is in the business of health care services and represents four or more health care providers in contracting with payors for the payment of health care services. The term includes, but is not limited to, physician organizations, physician-hospital organizations, independent practice associations, provider networks, and accountable care organizations.

The notice to the AG must:

- Include the names of the parties and their current business addresses.
- Include a description of the proposed relationship among the parties to the proposed transaction.
- Include a description of the health care services at each location at which services are currently provided and at any locations at which health care services will be provided.
- Identify the primary service area to be served by each location.
- Identify any information deemed by the filing organization to be a trade secret, as defined in s. 688.002, F.S., or exempt from public records laws pursuant to any other statutory exemption.

A hospital, hospital system, or provider organization that is a party to a material change may also voluntarily provide additional information to the AG. A hospital, hospital system, or provider organization that fails to comply with the section is subject to a civil penalty of not more than $500,000 which will be deposited into the Legal Affairs Revolving Trust Fund under s. 16.53(1), F.S. Beginning on January 1, 2022, the AG must submit a biennial report to the Legislature regarding its review of transactions under this section.

The bill also creates two new unnumbered sections of Florida law.

Section 2 of the bill authorizes the AG to engage the services of consultants, experts, accountants, economists, analysts, and other assistants as necessary to conduct its review under Section 1 of the bill. The bill specifies that reasonable expenses related to such services must be paid by the parties to the transaction.

Section 3 of the bill authorizes, for the 2021-2022 fiscal year, the DLA to hire 12 FTE at a salary rate of 629,382 and appropriates $1,221,249 in recurring and $47,472 in nonrecurring funds to the DLA for the purposes of implementing section 1 of the bill.

The bill provides an effective date of July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

Article VII, Section 19 of the State Constitution requires a new state tax or fee that is imposed or authorized by the Legislature to be "contained in a separate bill that contains no other subject."

Section 2 of SB 1064 authorizes the AG to "engage the services of consultants, experts, accountants, economists, analysts, and other assistants" to aid in reviews authorized by the bill and requires the reasonable expenses for such experts to be paid by the parties to the transaction under review.

The bill's requirement for the parties to the transaction to pay such expenses may constitute the imposition or authorization of a new fee by the Legislature and therefore may require a separate fee bill and a two-thirds vote of the Legislature pursuant to the State Constitution.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

SB 1064 may have an indeterminate negative fiscal impact on hospitals, hospital systems, and provider organizations if transactions between such entities are delayed or halted due to the review AG's review required by the bill. Additionally, such entities may see an indeterminate negative fiscal impact from Section 2 of the bill which requires the parties to a transaction under review to pay the reasonable expenses for the services of consultants, experts, accountants, economists, analysts, and other assistants hired by the AG to aid in its review.

C. Government Sector Impact:

SB 1064 appropriates $1,221,249 in recurring and $47,472 in nonrecurring funds to the DLA from the General Revenue Fund to hire 12 FTE and implement the provisions of section 1 of the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 542.275 of the Florida Statutes.

This bill creates two unnumbered sections of Florida law.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.