June 28, 2024

The Honorable Thomas Umberg
Chair, Senate Judiciary Committee
1021 O Street, Room 3240
Sacramento, CA 95814

SUBJECT: AB 3129 (Wood, as amended 6-27-24): Oppose

Dear Senator Umberg:

Californians deserve greater access to health care services, which requires ongoing investment to preserve and expand care. Assembly Bill (AB) 3129 (Wood, D-Healdsburg), as recently amended, would disincentivize critical investments, reducing access and the number of investors in California's health care delivery system. **The California Hospital Association, on behalf of more than 400 hospitals and health systems, opposes AB 3129.**

- **Investment in health care should be encouraged, not restricted.** The state should encourage investment in California's fragile health care delivery system, rather than further destabilize it. In recent years, several California hospitals have partnered with private entities to bring new or expanded patient services online. As a result, for example, inpatient rehabilitation hospitals have been built in communities including Sacramento, Irvine, Escondido, and Century City. **This bill would create barriers to successful new investments such as these, when exactly the opposite is needed.**

- **The existing Department of Justice (DOJ) review process should be overhauled, not expanded.** The current process has had a chilling effect on hospital transactions, causing potential investors to forgo investment in California health care due to significant concerns that DOJ review:
  - Requires hospitals — including those that are financially failing — to invest thousands of hours of work from legal, financial, operational, and clinical experts in order to submit a notice to the DOJ
  - Can take nearly a year — or in some cases, even longer — to complete
  - Is unpredictable – the law lacks clear guidelines as to when a transaction will be approved, and/or the conditions that the AG may impose
  - Has resulted in hospitals receiving bills from the DOJ in the hundreds of thousands of dollars per transaction

Some parties not completely deterred in advance by the current process have experienced the DOJ imposing such onerous conditions that the transactions have been abandoned, causing hospitals to close, declare bankruptcy, or forgo service expansion and improvement. While lost investment is difficult to quantify, it must be considered in any discussion of the review process.

- **The standards for review are unclear.** The entities subject to the bill, as well as DOJ staff, should have a clear understanding from the Legislature regarding which types of transactions are likely to be approved. Without clear and consistent standards, entities will struggle to determine whether DOJ approval is required or likely to be granted. Unfortunately, a "public interest" standard that allows the DOJ to consider any factor whatsoever leaves room for interpretation, so partnering health care entities that believe they are expanding or preserving access to patient care may still fail to receive approval. AB 3129 lacks objective standards, delegating unchecked discretion to the DOJ and jeopardizing investment required to preserve vital services. California must compete with other states to attract investment; AB 3129 would encourage investors to go elsewhere.

- **The bill includes no direction to the DOJ regarding the conditions it is authorized to impose.** Can the DOJ prohibit the sale and leaseback of real estate? Can it cap profits or dividend payments? The DOJ and regulated entities need to better understand exactly what authority the Legislature is delegating. DOJ overreach should be prevented.

- **The appeal process is improved, but difficult in practice without clear standards for DOJ review and parameters for conditions imposed by the DOJ.** Recent amendments to the bill would create a process allowing a transacting party that disagrees with the DOJ decision to appeal to an administrative law judge and thereafter to the superior court. CHA appreciates this addition to the bill. However, it's difficult to understand how a judge will review a DOJ decision when the DOJ has such wide discretion to approve, approve with conditions, or deny a transaction.

- **The definition of "private equity group" is too broad.** The bill adopts an extraordinarily broad definition of "private equity group" — so broad that it would deem every investing organization (including a hospital) to be a private equity group if it participates in managing the health care entity in any way. The definition of "hedge fund" is also very broad. Entities such as hospitals that are not generally considered to be private equity groups or hedge funds would be subject to the expanded authority of the DOJ proposed by AB 3129.

- **The criteria used to identify financially distressed entities that may obtain a DOJ waiver should mirror the standard criteria used by the U.S. Department of Justice and Federal Trade Commission.** The Merger Guidelines by the U.S. Department of Justice and the Federal Trade Commission (2023) use the following criteria:

  - The evidence shows that the entity faces the grave probability of a business failure. "The Agencies typically look for evidence in support of this element that the allegedly failing firm would be unable to meet its financial obligations in the near future."

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- “The prospects of reorganization are dim or nonexistent. “The Agencies typically look for evidence suggesting that the failing firm would be unable to reorganize successfully under Chapter 11 of the Bankruptcy Act…”

- The company that acquires the failing entity is the only available purchaser. “The Agencies typically look for evidence that a company has made unsuccessful good-faith efforts to elicit reasonable alternative offers that pose a less severe danger to competition than does the proposed merger.”

  AB 3129 deviates from industry practice unnecessarily and inadvisedly. For example, instead of determining whether a health care provider would be unable to meet its financial obligations *in the near future* (as specified by the federal government), AB 3129 requires that the provider have *lost money for three or more years*. Many financially struggling hospitals or other health care providers can’t survive with three years of losses.

- **This bill is premature and unnecessary.** Existing law requires the Department of Health Care Access and Information’s Office of Health Care Affordability (OHCA) to analyze the transactions covered by AB 3129. OHCA is the state agency responsible for gathering data about California’s health care marketplace and understanding the health care delivery system, payment system, access, and costs. Existing law prohibits transactions from closing until 60 days after OHCA publishes its final impact analysis — which gives the DOJ time to go to court to stop the transaction if it believes any laws are being violated. After all the time, effort, and resources spent to establish OHCA, issue regulations to regulate parties undertaking transactions, and gather data, now is not the time to take away OHCA’s new authority. **The new OHCA process should be given a chance to work. In addition, the DOJ has long had the ability to investigate and prosecute anticompetitive behavior, as do federal government authorities.**

Across California, hospitals are fighting to provide continued patient care while weathering a capacity crisis brought on by financial instability, workforce challenges, important seismic upgrades, and other challenges. This access crisis can only be alleviated by new investment to expand and retain services. California policy should be to encourage investment, not make it more difficult. **For these reasons, the California Hospital Association requests your “no” vote on AB 3129.**

Sincerely,

Meghan Loper, Consulting Lobbyist
California Hospital Association

cc: Assembly Member Jim Wood
Honorable Members of the Senate Judiciary Committee
Amanda Mattson, Consultant, Senate Judiciary Committee
Morgan Branch, Consultant, Senate Republican Caucus