

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 853 (Maienschein)
Version: July 3, 2023
Hearing Date: July 11, 2023
Fiscal: Yes
Urgency: No
AM

SUBJECT

Retail grocery stores and retail drug stores: acquisition: notice to Attorney General

DIGEST

This bill prohibits a person from acquiring any voting securities or assets of a retail grocery firm or retail drug firm unless both parties give, or in the case of a tender offer, the acquiring party gives, written notice to the Attorney general (AG) no less than 180 days before the merger, as specified.

EXECUTIVE SUMMARY

According to the proponents of the bill, the number of grocery stores nationwide declined by roughly 30 percent from 1993 to 2019 as the combined market share of the four largest grocery retailers tripled to 69 percent. In 2019 alone, mergers and acquisitions in the food industry exceeded 300. Nearly one-million Californians live without access to a nearby grocery store in communities called food deserts, which leads to health disparities and high rates of chronic disease. In October 2022, Kroger and Albertsons, the first and second largest grocery chain in the nation, announced an unprecedented \$25 billion merger for what would be the largest proposed grocery store merger in American history.¹ The combination of these two giant grocery chains will create a combined market share and control of 36 percent of the US grocery supermarket operators. In order to provide more information regarding the consolidation in the retail food industry, the bill requires a person acquiring any voting securities or assets of a retail grocery firm or retail drug firm to provide notice to the AG.

The bill is sponsored by the United Food and Commercial Workers, Western States Council. It is supported by a broad coalition of labor and various other progressive organizations. There is no known opposition.

¹ John Yang, *What the proposed Kroger and Albertsons merger could mean for shoppers and food prices*, PBS News Hour (Nov. 25, 2022), available at <https://www.pbs.org/newshour/show/what-the-proposed-kroger-and-albertsons-merger-could-mean-for-shoppers-and-food-prices>.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides, under the federal Sherman Act, that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is illegal. (15 U.S.C. Section 1.)
- 2) Establishes the Cartwright Act as California's antitrust law that prohibits anticompetitive activity. (Bus. & Prof. Code § 16000 et. seq.) Provides that, except as expressly provided, every trust is unlawful, against public policy and void. (Bus. & Prof. Code § 16726.)
- 3) Defines a "trust" to mean a combination of capital, skill or acts by two or more persons to create or carry out restrictions in trade or commerce, to limit or reduce the production or increase the price of merchandise or of any commodity, to prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce or any commodity, and to enter into contracts or agreements that agree to pool, combine, or directly or indirectly unite any interests that they may have connected with the sale or transportation of any article or commodity, that its price might in any manner be affected. (Bus. & Prof. Code § 16720.)
- 4) Establishes the Unfair Competition Law, which provides for a civil penalty for unfair competition, defined to include any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising. (Bus. & Prof. Code § 17200 et seq.)
- 5) Prohibits, under the Unfair Practices Act, acts which injure competition, including sales below cost, locality discrimination, and secret rebates or unearned discounts. (Bus. & Prof. Code §17000 et seq.)
- 6) Requires any nonprofit corporation that operates or controls a health facility, or operates or controls a facility that provides similar health care, to provide written notice to, and to obtain the written consent of, the AG prior to entering into any agreement or transaction, to do either of the following:
 - a) Sell, transfer, lease, exchange, option, convey, or otherwise dispose of, its assets to a for-profit corporation or entity or to a mutual benefit corporation or entity when a material amount of the assets of the nonprofit corporation are involved in the agreement or transaction.
 - b) Transfer control, responsibility, or governance of a material amount of the assets or operations of the nonprofit corporation to any for-profit corporation or entity or to any mutual benefit corporation or entity. (Corp. Code § 5914(a).)

- 7) Provides, pursuant to the California Constitution, that the people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies are required to be open to public scrutiny. (Cal. const. art. I, § 3(b)(1).)
 - a) Requires a statute to be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. (Cal. const. art. I, § 3(b)(1).)
 - b) Requires a statute that limits the public's right of access to be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest. (Cal. const. art. I, § 3(b)(1).)

- 8) Governs the disclosure of information collected and maintained by public agencies pursuant to the CPRA. (Gov. Code §§ 7920.000 et seq.)
 - a) States that the Legislature, mindful of the individual right to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Gov. Code § 7921.000.)
 - b) Defines "public records" as any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. (Gov. Code § 7920.530.)
 - c) Provides that all public records are accessible to the public upon request, unless the record requested is exempt from public disclosure. (Gov. Code § 7922.530.)
 - d) Provides an exemption from disclosure for records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege. (Gov. Code § 7927.705.)

This bill:

- 1) Prohibits any person from acquiring, directly or indirectly, any voting securities or assets of a retail grocery firm or retail drug firm unless both parties, or in the case of a tender offer, the acquiring party, gives written notice to the Attorney General.

- 2) Defines the following for the purpose of this bill:
 - a) "Acquiring party" means a person by whom or on whose behalf the merger or other acquisition of control is to be effected and is either of the following:
 - i) Required to provide notice of the merger or acquisition to the Federal Trade Commission (FTC) or the U.S. Department of Justice (U.S. DOJ) pursuant to the federal Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 18a).
 - ii) Is acquiring more than a total of unspecified number of retail drug firms or retail grocery firms.

- b) "Retail drug firm" means a person, as defined in existing provisions of the Labor Code, including a proprietorship, joint venture, corporate officer or executive, that has one or more businesses or establishments located within the state and is identified as a retail business or establishment in the North American Industry Classification System within the retail trade category 45611.
 - c) "Retail grocery firm" means a person, as defined in existing provisions of the Labor Code, including a proprietorship, joint venture, corporate officer or executive, that has one or more businesses or establishments located within the state and is identified as a retail business or establishment in the North American Industry Classification System within the retail trade category 44511 and 455211.
- 3) Requires the written notice to be filed with the Attorney General at least 180 days before the acquisition is made effective, and be made under oath or affirmation.
- a) If any transaction requiring written notice commences before the effective date of this section, the written notice must be given to the AG within 30 days before the transaction is made effective. Upon receiving this notice, the AG has 180 days to evaluate the transaction, during which time the effective days of the transaction must be tolled.
 - b) If any material change occurs in the facts set forth in the written notice filed with the AG, an amendment setting forth the change and copies of all documents and other relevant material must be filed with the AG within 2 business days after the amendment is made by, or provided to, the acquiring party.
- 4) Requires the notice given to the AG, if the acquiring party is required to file notice with the FTC or the U.S. DOJ pursuant to the federal Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Hart-Scott-Rodino Act), to contain the same form and additional documentary material required under that act and any implementing regulations under that act. (15 U.S.C. § 18a.)
- 5) Requires the notice given to the AG, if the acquiring party is not required to file notice with the FTC or the U.S. DOJ pursuant to the federal Hart-Scott-Rodino Antitrust Improvements Act of 1976, to contain all of the following information:
- a) The name and address of each acquiring party, and a report of the nature of its business operations during the past five years or for a lesser period if the person and their predecessors have been in existence less than five years.
 - b) An informative description of the business intended to be done by the person and the person's subsidiaries, as specified.
 - c) A list of all individuals who are or have been selected to become directors or executive officers or who perform or will perform functions appropriate to the positions.
 - d) The source, nature, and amount of the consideration used or to be used in effecting the merger or other acquisition of control, a description of any transaction in which funds were or are to be obtained, including any pledge of the drug or grocery retail firm's stock or the stock of any of its subsidiaries or

- controlling affiliates, and the identity of persons furnishing the consideration. If a source of the consideration is a loan made in the lender's ordinary course of business, the identity of the lender shall remain confidential upon request of the person filing the statement.
- e) Fully audited financial information as to the earnings and the financial condition of each acquiring party for the preceding five fiscal years or for a lesser period if the acquiring party and its predecessors have been in existence for less than five years, and similar unaudited information as of a date not earlier than 90 days before the written notice.
 - f) Any plans or proposals that an acquiring party may have to liquidate the retail grocery or retail drug firms, to sell its assets or merge or consolidate it with any person, or to make any other material change in its business or corporate structure.
 - g) The information required to assess the competitive effects of the proposed acquisition, giving particular attention to the effects on the proposed chain retail grocery store acquisition on consumers, including, but not limited to, consumer choice, food pricing, access to food, and food deserts, and factors affecting the supply of experienced grocery workers, including wages, benefits, and unemployment and chain retail pharmacy on patients, including, but not limited to, patient choice, medicine pricing, access to medications, and factors affecting the supply of licensed pharmacists, pharmacy technicians, and pharmacists-in-training.
 - h) Information required to assess the economic and community impact of any planned divestiture or store closures, including, but not limited to, the impact on food deserts, food supply, economic mobility, unemployment, and small businesses.
- 6) Authorizes the Attorney General to adopt regulations to implement these provisions that are necessary or appropriate for the protection of workers, consumers, and the public interest, including authorization for the Attorney General to request additional materials.
- 7) Authorizes the Attorney General to specify exemptions from the notice requirement for acquisitions that, by virtue of the size, business volume, or number of employees are unlikely to materially affect competitive markets in California.
- 8) Authorizes the Attorney General, in the event the office determines they cannot complete an evaluation of the competitive effects of the acquisition before the parties intend to consummate the acquisition, to seek an order from the superior court for the County of Sacramento temporarily staying or preliminarily enjoining the acquisition for such time as is reasonably necessary for the Attorney General to complete the analysis.

- 9) Requires the Attorney General to consider the extent to which information required to be submitted to the United States Department of Justice and the Federal Trade Commission may satisfy some or all of the need to carry out the applicable provisions of this bill, if the acquisition requires disclosures under existing provisions of federal law. Makes any information submitted to the Attorney General under provisions of federal law rendering them confidential privileged under California law.
- 10) Allows the submitting party to designate information submitted as privileged. If the Attorney General disputes any claim of privilege, they may give notice to the submitting party of that fact and give the submitting party, or other person interested in the claim of privilege, an opportunity to seek an order from a superior court for the County of Sacramento requiring the Attorney General not to make the designated information public. Makes all information except that which the Attorney General agrees is privileged or the court determines is privileged, available to the public under the California Public Records Act.
- 11) Exempts regulations adopted by the Attorney General pursuant to the provisions of this bill from the Administrative Procedures Act.
- 12) Establishes that failure to provide written notice, amendment to written notice, or other material required to be provided as a violation.
- 13) Authorizes the Attorney General to seek injunctive relief and other equitable remedies a court deems appropriate, as well as attorney's fees and costs.
- 14) Makes various findings and declarations regarding the state's interest in maintaining the confidentiality of the disclosures required by the bill's provisions.

COMMENTS

1. Stated need for the bill

The author writes:

Mergers and acquisitions in the food and drug-retail industries disproportionately impact underserved and marginalized communities. The public has a right to know about any future proposed merger or acquisition involving essential goods and services like food and medicine. AB 853 is a simple notice bill that requires parties to grocery and drug-retail mergers or acquisitions to offer forecasts and analyses to the Attorney General and, hence, the public, about the public policy consequences of their merger so that an informed debate can occur about what, if anything, to do about the merger.

2. Bill is intended to address concerns about consolidation of grocery stores and drug retail stores by providing notice to the AG of the proposed merger

Since the announcement of the Kroger and Albertsons merger, the Federal Trade Commission (FTC) has initiated its regulatory review process of the proposal and faces pressure from state and federal lawmakers, as well as consumer advocacy groups, to fully evaluate the impact of the merger.² Kroger announced a preemptive divestiture plan as part of its proposal to the FTC, which would require Kroger to sell off a portion of grocery stores in a given geographic area to other retailers with the goal of ensuring sufficient competition within that area. The most recent plan appears to propose divestiture of approximately 650 Albertsons stores.³

In light of this, the bill proposes a new notice procedure whereby any entity intending to acquire, whether directly or indirectly, stock or assets in a retail grocery firm or retail drug firm must first submit specified information to the AG. Existing law already contains similar notice requirements for other industries, such as the health care and hospital industry. For example, since 1996, nonprofit health care facilities have been required to obtain written consent from the Attorney General before entering into any sale or acquisition agreement. (Corp. Code § 5914.) The purpose behind the original bill establishing the AG's oversight of specified health care mergers and acquisitions was to ward off any reduction in access to health care services for underinsured or uninsured individuals, and that by providing the AG's office with notice so the AG can assess whether the potential risks of consolidation of a service provider would result in a lack of necessary services to any community within the state.

In a similar vein, this bill requires notice of a merger or acquisition of a retail grocery firm or retail drug firm in order to allow the AG's office the opportunity to evaluate the proposed transaction. The bill requires the notice to be provided 180 days before the acquisition is made effective. In regards to transactions that commences before the effective date of the bill, notice must be given to the AG within 30 days before the transaction is made effective. The AG will have 180 days to evaluate the transaction upon receiving notice from the submitting party, during which time the effective date of the transaction is to be tolled. Recent amendments to the bill limit the bill's provisions to only requiring notice from either: an acquiring party that is required to provide notice of a merger or acquisition to the FTC or the U.S. DOJ pursuant to the Hart-Scott-Rodino Act; or is acquiring more than a total of an unspecified number of drug firms or retail grocery firms. The author's office has indicated that they have been negotiating with stakeholders, including the opposition, to find an appropriate number

² Alina Selyukh, *Kroger and Albertsons plan merger to combine 2 largest supermarket chains*, NPR (October 14, 2022), available at <https://www.npr.org/2022/10/14/1129014897/kroger-and-albertsons-plan-merger-to-combine-2-largest-supermarket-chains>.

³ Dan Papsun, *Kroger-Albertsons Divestiture Bid Aims to Head Off Challenge*, Bloomberg Law (October 14, 2022), available at <https://news.bloomberglaw.com/antitrust/kroger-albertsons-divestiture-plan-is-bid-to-deflect-regulators>.

of stores being acquired that should trigger the notice requirements under this bill. Recent amendments to the bill seek to streamline the notification requirements for those persons who are also required to report under the Hart-Scott-Rodino Act by providing that notice to the AG is to contain the same form and additional documentary material required under the Hart-Scott-Rodino Act and any implementing regulations.

The notice that must be provided for those acquiring more than a total of an unspecified number of drug firms or retail grocery firms is required to include details regarding the parties engaging in the transaction in order to flag any potentially concerning consolidation. The notice would also include information regarding any potential impacts on food pricing, access to food, expansion or diminution of food deserts, the supply of grocery workers or impact on the same work force, and other factors that may impact the availability of a robust grocery retailer environment. In the event the retailers fail to file the requisite notice, the bill authorizes the Attorney General to seek injunctive relief to freeze the merger, and specifies that the AG is entitled to recover attorney's fees and costs and a civil penalty of up to \$20,000 for each day of noncompliance. Recent amendments also require the AG to charge a filing fee to receive, review, and analyze the notice. The filing fee is prohibited from exceeding the reasonable regulatory costs to the Attorney General incident to performing its administrative duties, but provides that the fee is not to exceed .00045 percent of the combined sales of the parties to the merger or acquisition for the fiscal year prior to the filing of the notice.

In recognition that the information being provide to the AG under this bill contains sensitive and proprietary financial information, the bill specifies that any information that has been submitted to the AG under provisions of federal law rendering them confidential are deemed confidential under state law. The bill allows the submitting party to designate information as privileged or confidential. If the AG disputes any claim of privilege or confidentiality, the AG must give the submitting party notice and the submitting party may seek an order from the Superior Court of the County of Sacramento requiring the information to not be disclosed. California generally recognizes that public access to information concerning the conduct of the people's business is a fundamental and necessary right. At the same time, the state recognizes that this right must be balanced against the right to privacy. The CPRA already contains an exemption for information that is privileged under the Evidence Code. (Gov. Code § 7927.705.) In light of the proprietary nature of information required to be provided to the AG, the potential limiting of access to public records in this bill seems warranted.

3. Proposed Amendment

The California Grocers Association was in opposition to this bill. However, the most recent amendments to the bill and a commitment from the author to amend in 20 stores as the threshold reporting requirement for entities who do not need to report under the

Hart-Scott-Rodino Act have moved them to neutral. In light of this, the author has proposed to amend the bill to add in 20 as the threshold reporting requirement.

The specific amendment is:

Section 14700 as added to the Corporations Code, is amended to read:

14700. (a) No person shall acquire, directly or indirectly, any voting securities or assets of a retail grocery firm or retail drug firm unless both parties give, or in the case of a tender offer, the acquiring party gives, written notice to the Attorney General in accordance with this part.

(b) For purposes of this part, the following definitions apply:

(1) "Acquiring party" means a person by whom or on whose behalf the merger or other acquisition of control is to be effected and is either of the following:

(A) Is required to provide notice of the merger or acquisition to the Federal Trade Commission or the United States Department of Justice pursuant to the federal Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. Sec. 18a).

(B) Is acquiring more than a total of ~~___~~ 20 retail drug firms or retail grocery firms.

(2) "Retail drug firm" means a person, as defined in Section 18 of the Labor Code, including a proprietorship, joint venture, corporate officer or executive, that has one or more businesses or establishments located within the state and is identified as a retail business or establishment in the North American Industry Classification System within the retail trade category 45611.

(3) "Retail grocery firm" means a person, as defined in Section 18 of the Labor Code, including a proprietorship, joint venture, corporate officer or executive, that has one or more businesses or establishments located within the state and is identified as a retail business or establishment in the North American Industry Classification System within the retail trade category 44511 and 455211.

4. Statements in Support

The United Food and Commercial Workers, Western States Council, the sponsor of the bill, writes in support stating:

In the wake of the largest proposed grocery store merger in American history, the United Food and Commercial Workers Western States Council (UFCW), on behalf of its over 180,000 members, is proud to sponsor AB 853 which simply requires vast

grocery chains to analyze and forecast the consequences of their mergers for California families and workers. [...]

The [Kroger] acquisition allows for a divestiture of as many as 650 Albertsons stores. However, past supermarket divestitures have struggled within months of being separated and ultimately failed. Unless this merger of the first and second largest national competitors in retail sales last year among the U.S. food and grocery supermarket operators is prohibited, the unified company will become the largest supermarket by revenue in the United States with a current national market share of 36 percent. Albertsons, with a national market share of 12.4 percent, will be eliminated.

In California, Kroger owns and operates approximately 214 stores under the Ralphs banner and an additional 19 under Food 4 Less. A majority of these stores are located in Southern California. The Albertsons Company operates approximately 579 grocery stores in California: 125 stores under the Albertsons banner, along with 26 Pavilion, 243 Safeway, and 185 Vons stores.

In many areas in California, residents lack cars and must travel to grocery stores by walking or public transit, which prevents them from traveling outside the community areas in which they work or live to shop at alternative grocery stores. As a result, the majority of consumers' grocery shopping occurs at stores located very close to where they live or work. Thus, for many California families, accessibility of supermarkets by foot or by public transit is critical for the communities' health as a whole. Yet, access to adequate high-quality food and grocery stores is already an issue for many Californians. In 2016, before many mergers, nearly one million Californians, 45 percent of whom are low-income, live without access to nearby supermarkets or large grocery stores in communities known as "food deserts." These types of environments encourage poor eating habits, which can lead to poor health.

If Kroger's proposed acquisition of Albertsons is consummated, the companies' combined power will be used to increase prices for groceries, decrease the quality of food, eliminate jobs, close stores and offer less choice for consumers due to the overlap in geographic areas. And, as is customary in these acquisitions, the first casualties of the removal of competition will be the firing of employees who were only needed when competition existed. Staffing will decrease, leading to worse service for consumers and worse conditions for workers. Prices will go up, and promotions will decrease, and that translates directly into the quantity and quality of food that families can put on their tables.

SUPPORT

United Food and Commercial Workers, Western States Council (sponsor)
Agricultural Institute of Marin

Alchemist CDC
California Food and Farming Network
California Labor Federation
Center for Food Safety
Ceres Community Project
Community Alliance With Family Farmers
Los Angeles Food Policy Council
Pesticide Action Network North America
Public Health Advocates
Roots of Change
Sacramento Food Policy Council
San Diego Food System Alliance
Sierra Harvest
Small Business Majority
The Praxis Project

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation:

AB 647 (Holden, 2023) increases the period of time during which a successor grocery employer to hire from a recall list provided by the incumbent grocery employer from 90 to 120 days, and increases the period of time during which the successor grocery employer must retain the eligible employees from 90 to 120 days. AB 647 is pending in this Committee on the same day at this bill.

SB 627 (Smallwood-Cuevas, 2023) requires an employer, for a year after the closure of a covered establishment, to provide to all covered workers the opportunity to remain employed by the employer and to transfer to a location of the chain within 25 miles of the covered establishment subject to closure as positions become available, as provided. SB 627 is pending in the Assembly Judiciary Committee.

SB 725 (Smallwood-Cuevas, 2023) prohibits a grocery establishment, where the change in control is a merger, from ordering a mass layoff, relocation, or termination at a covered establishment unless, 180 days before the order takes effect, the employer gives notice of the order to the employees of the covered establishment affected by the order, the Employment Development Department, the local workforce investment board, and the chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs. SB 725 is pending in the Assembly Labor and Employment Committee.

Prior Legislation:

SB 93 (Committee on Budget and Fiscal Review, Ch. 16, Stats. 2021), requires hospitality and service industry employers to offer to rehire qualified former employees who were laid off due to the COVID-19 pandemic, and requires them to be rehired for the same or similar positions as they last held.

AB 359 (Gonzalez, Ch. 212, Stats. 2015) requires, upon a change in ownership of a grocery store, that an incumbent employer prepares a list of specified eligible grocery workers for a successor grocery employer, and requires the successor grocery employer to hire from this list during a 90-day transition period, as provided.

PRIOR VOTES

Assembly Floor (Ayes 62, Noes 16)

Assembly Appropriations Committee (Ayes 11, Noes 4)

Assembly Judiciary Committee (Ayes 7, Noes 2)
