

## BILL ANALYSIS

Senate Research Center  
86R33280 SRA-F

C.S.H.B. 3301  
By: Darby et al. (Perry)  
Business & Commerce  
5/16/2019  
Committee Report (Substituted)

### AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

C.S.H.B. 3301 amends current law relating to merger agreements among certain hospitals and authorizes fees.

### RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to a state agency designated by the governor in SECTION 1 (Section 314A.005, Health and Safety Code) of this bill.

### SECTION BY SECTION ANALYSIS

SECTION 1. Amends Subtitle F, Title 4, Health and Safety Code, by adding Chapter 314A, as follows:

#### CHAPTER 314A. MERGER AGREEMENTS AMONG CERTAIN HOSPITALS

##### SUBCHAPTER A. GENERAL PROVISIONS

Sec. 314A.001. DEFINITIONS. Defines "attorney general," "designated agency," "hospital," "merger agreement," "merger," and "state agency."

Sec. 314A.002. APPLICABILITY. Provides that this chapter applies only to a merger agreement among hospitals each of which is located within a county that contains two or more hospitals, and has a population of less than 100,000 and is not adjacent to a county with a population of 250,000 or more, or has a population of more than 100,000 and less than 150,000 and is not adjacent to a county with a population of 100,000 or more.

Sec. 314A.003. LEGISLATIVE FINDINGS AND PURPOSES; GRANT OF ANTITRUST IMMUNITY. (a) Provides that the legislature finds that:

(1) a merger among hospitals may benefit the public by maintaining or improving the quality, efficiency, and accessibility of health care services offered to the public; and

(2) the benefits described by Subdivision (1) resulting from the merger may outweigh any anticompetitive effects of joining together competitors to address unique challenges in providing health care services in rural areas.

(b) Provides that the legislature believes it is in the state's best interest to supplant state and federal antitrust laws with a process for regulatory approval and active supervision by the dedicated agency as provided by this chapter. Provides that it is the intent of the legislature that this chapter immunize from all federal and state antitrust laws the execution of merger agreements approved under this chapter and post-merger activities supervised under this chapter.

(c) Provides that nothing in this chapter affects antitrust immunity that may be provided through another provision of state law.

Sec. 314A.004. DESIGNATION OF SUPERVISING STATE AGENCY. (a) Requires the governor to designate an appropriate state agency, other than the Office of the Attorney General, to:

(1) review and approve or deny applications submitted under this chapter for certificates of public advantage; and

(2) supervise as provided by Subchapter C the activities for which a certificate of public advantage is issued.

(b) Authorizes the governor, after the governor designates a state agency under Subsection (a), to designate another appropriate state agency under that subsection at any time.

(c) Provides that a change in the designation of a state agency made under this section does not affect the validity of any action taken under this chapter by a predecessor designated agency.

Sec. 314A.005. RULEMAKING. Requires the designated agency to adopt rules for the implementation and administration of this chapter.

#### SUBCHAPTER B. CERTIFICATE OF PUBLIC ADVANTAGE

Sec. 314A.051. REVIEW AND CERTIFICATION OF MERGER AGREEMENTS REQUIRED. (a) Authorizes two or more hospitals to negotiate and enter into a merger agreement, subject to approval by the designated agency as provided by this subchapter.

(b) Requires that no merger agreement receive immunity under this chapter unless the designated agency issues a certificate of public advantage governing the merger agreement.

Sec. 314A.052. APPLICATION. (a) Authorizes one or more parties to a merger agreement to submit an application to the designated agency for a certificate of public advantage governing the merger agreement. Requires the application to include a written copy of the merger agreement and describe the nature and scope of the merger.

(b) Requires an applicant, if the applicant believes the documents or other information required to be submitted with an application under Subsection (a) contains proprietary information that is required to remain confidential, to clearly identify the information and submit duplicate applications, one application that has completed information for the designated agency's use and one redacted application that will be made available for public release.

(c) Requires a copy of the application and copies of all additional related materials to be submitted to the Texas attorney general (attorney general) and to the designated agency at the same time.

Sec. 314A.053. APPLICATION FEE. (a) Authorizes the designated agency to assess a fee for filing an application under Section 314A.052 in an amount not to exceed \$75,000. Requires the amount of the fee to be sufficient to cover the reasonable costs of the designated agency and attorney general in reviewing and approving or denying applications under this subchapter.

(b) Authorizes fees collected under this section to be appropriated to the designated agency for purposes of covering costs relating to the implementation and administration of this chapter, including the supervision of hospitals under this chapter.

Sec. 314A.054. REVIEW OF APPLICATION BY DESIGNATED AGENCY; GRANT OR DENIAL OF APPLICATION. (a) Requires the designated agency to review an application for a certificate of public advantage in accordance with the standard prescribed by Section 314A.056(a)(1).

(b) Requires the designated agency to grant or deny the application not later than the 120th day after the date of the filing of the application. Requires the designated agency's decision to be in writing, specify the basis for the decision, and provide a copy of the decision to the applicants on the date of the decision.

Sec. 314A.055. REVIEW OF APPLICATION BY ATTORNEY GENERAL. (a) Requires the attorney general to review an application for a certificate of public advantage and all supporting documents and information provided by the applicants. Requires the attorney general, on completion of the review and subject to Subsection (b), to advise the designated agency whether:

(1) the proposed merger agreement would likely benefit the public by maintaining or improving the quality, efficiency, and accessibility of health care services offered to the public; and

(2) the likely benefits resulting from the proposed merger agreement outweigh any disadvantages attributable to a reduction in competition that may result from the proposed merger.

(b) Requires the attorney general to review an application for a certificate of public advantage as soon as practicable, taking into consideration the deadline prescribed by Section 314A.054.

(c) Requires the attorney general, if the attorney general advises the designated agency to deny an application, to state the basis and reasons for the recommended denial.

Sec. 314A.056. ISSUANCE OF CERTIFICATE OF PUBLIC ADVANTAGE. (a) Requires the designated agency, after reviewing the application and consulting with the attorney general in accordance with Section 314A.055, to issue a certificate of public advantage for a merger agreement if:

(1) the designated agency determines under the totality of the circumstances that:

(A) the proposed merger would likely benefit the public by maintaining or improving the quality, efficiency, and accessibility of health care services offered to the public; and

(B) the likely benefits resulting from the proposed merger agreement described by Paragraph (A) outweigh any disadvantages attributable to a reduction in competition that may result from the proposed merger; and

(2) the application:

(A) provides specific evidence showing that the proposed merger would likely benefit the public as described by Subdivision (1)(A);

(B) explains in detail how the likely benefits resulting from the proposed merger agreement outweigh any disadvantages attributable to a reduction in competition as described by Subdivision (1)(B); and

(C) sufficiently addresses the factors listed in Subsection (b) and any factor the designated agency may require based on circumstances specific to the application.

(b) Requires the designated agency, in making the determination under Subsection (a)(1), to consider the effect of the merger agreement on the following nonexclusive list of factors:

(1) the quality and price of hospital and health care services provided to citizens of this state;

(2) the preservation of sufficient hospitals within a geographic area to ensure public access to acute care;

(3) the cost efficiency of services, resources, and equipment provided or used by the hospitals that are a party to the merger agreement;

(4) the ability of health care payors to negotiate payment and service agreements with hospitals proposed to be merged under this agreement; and

(5) the extent of any reduction in competition among physicians, allied health professionals, other health care providers, or other persons providing goods or services to, or in competition with, hospitals.

(c) Authorizes the designated agency to include terms or conditions of compliance in connection with a certificate of public advantage issued under this subchapter if necessary to ensure that the proposed merger likely benefits the public as specified in Subsections (a)(1).

Sec. 314A.057. RECORDS. Requires the designated agency to maintain records of all merger agreements the designated agency has approved under this chapter, including any terms or conditions of issuing a certificate of public advantage that are imposed by the designated agency.

Sec. 314A.058. TERMINATION OF CERTIFICATE OF PUBLIC ADVANTAGE BY HOSPITAL. Authorizes a hospital resulting from a merger agreement approved under this chapter to voluntarily terminate its certificate of public advantage by giving the designated agency notice at least 30 days before the date of the termination.

Sec. 314A.059. ANNUAL REVIEW OF CERTIFICATE. (a) Requires the designated agency to annually review an approved certificate of public advantage.

(b) Authorizes the attorney general to annually review an approved certificate of public advantage.

(c) Prohibits the designated agency from completing its annual review of an approved certificate of public advantage under this section until:

(1) the attorney general informs the designated agency whether the attorney general intends to conduct any review of the certificate of public advantage as authorized under this section; and

(2) if the attorney general informs the designated agency of the attorney general's intent to conduct a review of an entity's approved certificate of public advantage, the attorney general has had the opportunity to conduct the review.

#### SUBCHAPTER C. SUPERVISION OF MERGED HOSPITALS UNDER APPROVED MERGER AGREEMENT

Sec. 314A.101. SUPERVISION OF MERGED HOSPITALS. Requires the designated agency to supervise in the manner provided by this subchapter each hospital operating under a certificate of public advantage issued under this chapter to ensure that the immunized conduct of a merged entity furthers the purposes of this chapter.

Sec. 314A.102. RATE REVIEW. (a) Prohibits an increase in rates for hospital services by a hospital operating under a certificate of public advantage issued under this chapter from taking effect without prior approval of the designated agency as provided by this section.

(b) Requires a hospital operating under a certificate of public advantage, at least 90 days before the implementation of any proposed change in rates for inpatient or outpatient hospital services and, if applicable, at least 60 days before the execution of a reimbursement agreement with a third party payor, to submit to the designated agency:

(1) any imposed change in rates for inpatient and outpatient hospital services;

(2) if applicable, any change in reimbursement rates under a reimbursement rate agreement with a third party payor; and

(3) for an agreement with a third party payor, other than an agreement described by Subdivision (4) or in which rates are set under the Medicare or Medicaid program, information showing:

(A) that the hospital and the third party payor have agreed to the proposed rates;

(B) whether the proposed rates are less than the corresponding amounts in the producer price index published by the Bureau of Labor Statistics of the United States Department of Labor relating to the hospital services for which the rates are proposed or a comparable price index chosen by the designated agency if the producer price index described by this paragraph is abolished; and

(C) if the proposed rates are above the corresponding amounts in the producer price index as described by Paragraph (B), a justification for proposing rates above the corresponding amounts in the producer price index;

(4) to the extent allowed by federal law, for an agreement with a managed care organization that provides or arranges for the provision of health care services under the Medicare or Medicaid program, information showing:

(A) whether the proposed rates are different from rates under an agreement that was in effect before the date the applicable merger agreement took effect;

(B) whether the proposed rates are different from the rates most recently approved by the designated agency for the applicable hospital, if the designated agency has previously approved rates for the applicable hospital following the issuance of the certificate of public advantage under this chapter that governs the hospital; and

(C) if the proposed rates exceed rates described by Paragraph (A) or (B), a justification for proposing rates in excess of those rates; and

(5) any information concerning costs, patient volume, acuity, payor mix, and other information requested by the designated agency.

(c) Requires the designated agency, after receiving the proposed change in rates submitted under Subsection (b), to approve or deny the proposed rate change. Requires the designated agency to approve the proposed rate change if the designated agency determines that:

(1) the proposed rate change likely benefits the public by maintaining or improving the quality, efficiency, and accessibility of health benefit services offered to the public; and

(2) the proposed rate does not inappropriately exceed the competitive rates for comparable services in the hospital's market area.

(d) Requires the designated agency, if the designated agency determines that the proposed rate change does not satisfy Subsection (c)(1) or (2), to deny or modify the proposed rate change.

(e) Requires the designated agency to notify the hospital in writing of the designated agency's decision to approve, deny, or modify the proposed rate change not later than the 30th day before the implementation date of the proposed change.

Sec. 314A.103. ANNUAL REPORT. Requires each hospital operating under a certificate of public advantage to submit an annual report to the designated agency. Requires the report to include:

(1) information about the extent of the benefits attributable to the issuance of the certificate of public advantage;

(2) if applicable, information about the hospital's actions taken in furtherance of any commitments made by the parties to the merger or to comply with terms imposed by the designated agency as a condition for approval of the merger agreement;

(3) a description of the activities conducted by the hospital under the merger agreement;

(4) information relating to the price, cost, and quality of and access to health care for the population served by the hospital; and

(5) any other health information required by the designated agency to ensure compliance with this chapter, including compliance relating to compliance with any terms or conditions for issuance of the certificate of public advantage.

Sec. 314A.104. CORRECTIVE ACTION PLAN. (a) Requires the designated agency to require a hospital acting under a certificate of public advantage to adopt a plan to correct a deficiency in the hospital's activities if the designated agency determines that an activity of the hospital does not benefit the public as described by Section 314A.056(a)(1)(A) or no longer meets the standards prescribed by Section 314A.056(a)(1).

(b) Requires the corrective action plan to include each provision required by the designated agency and to be submitted at the designated agency's discretion.

Sec. 314A.105. SUPERVISION FEE. Authorizes the designated agency to assess an annual supervision fee in an amount that is at least \$75,000 but not more than \$200,000 against each hospital operating under a certificate of public advantage under this chapter. Requires the amount of the fee imposed on hospitals under this subsection to be based on the assessment by the designated agency of the amount needed to cover reasonable costs

incurred by the designated agency in supervising hospitals under this subchapter and in implementing and administering this chapter.

(b) Authorizes fees collected under this section to be appropriated to the designated agency for purposes of covering costs relating to the implementation and administration of this chapter, including the supervision of hospitals under this chapter.

#### SUBCHAPTER D. ENFORCEMENT AUTHORITY BY THE DESIGNATED AGENCY

Sec. 314A.151. INVESTIGATION; REVOCATION OF CERTIFICATE. Authorizes the designated agency, with respect to each hospital resulting from a merger agreement for which the designated agency issued a certificate of public advantage under this chapter, and to ensure that the hospital's activities continue to benefit the public under the standard prescribed by Section 314A.056(a)(1) and the provisions of this chapter, to:

(1) investigate the hospital's activities; and

(2) require the hospital to perform a certain action or refrain from a certain action or revoke the hospital's certificate of public advantage, if the designated agency determines that:

(A) the hospital is not complying with this chapter or a term or condition of compliance with the certificate of public advantage governing the hospital's immunized activities;

(B) the designated agency's approval and issuance of the certificate of public advantage was obtained as a result of material misrepresentation;

(C) the hospital has failed to pay any fee required under this chapter; or

(D) the benefits resulting from the approved merger no longer outweigh the disadvantages attributable to the reduction in competition resulting from the approved merger.

Sec. 314A.152. JUDICIAL REVIEW OF DESIGNATED AGENCY ACTION. (a) Authorizes a person aggrieved by a decision of the designated agency in granting, denying, or refusing to act on an application for a certificate of public advantage submitted under Subchapter B or revoking a certificate of public disadvantage issued under this chapter to appeal the final order by filing a petition for judicial review in a district court of Travis County.

(b) Provides that the filing of a petition for judicial review of a decision by the designated agency to revoke a certificate of public advantage stays enforcement of the designated agency's decision.

(c) Requires the designated agency, not later than the 45th day a person files a petition for judicial review under this section, to submit to the district court the original copy or a certified copy of the entirety of the designated agency's record regarding the decision under review. Authorizes the record, by stipulation of all parties, to be shortened. Authorizes the district court to require or permit later corrections or additions to the record. Authorizes the district court to extend the period prescribed by this subsection for submitting the designated agency's record to the court.

(d) Requires the district court to conduct the review sitting without a jury.

(e) Authorizes the district court to reverse a decision by the designated agency regarding revocation of a certificate of public advantage if the court finds that the decision is:

- (1) in violation of a constitutional or statutory provision;
- (2) in excess of the designated agency's statutory authority;
- (3) made through unlawful procedure;
- (4) arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion; or
- (5) unsupported by substantial and material evidence in light of the record as a whole.

(f) Provides that the district court, under Subsection (e)(5), in determining the substantiality of the evidence, is required to consider other evidence that detracts from the substantiality, and is prohibited from substituting its judgment for the judgment of the designated agency on the weight of the evidence as to a question of fact.

(g) Requires the district court to issue a written decision setting forth the court's findings of fact and conclusions of law. Requires the designated agency to add the court's decision to the designated agency's records.

#### SUBCHAPTER E. ATTORNEY GENERAL INVESTIGATION AND ENFORCEMENT AUTHORITY

Sec. 314A.201. CIVIL INVESTIGATIVE DEMAND. (a) Authorizes the attorney general, at any time after an application is filed under Section 314A.052 and before the designated agency makes a determination of the application, or in connection with the agency's annual review of a certificate of public advantage under Section 314A.059, to require by civil investigative demand the attendance and testimony of witnesses and the production of documents in Travis County or the county in which the applicants are located for the purpose of investigating whether the merger agreement satisfies or, after issuance of the certificate of public advantage, continues to satisfy the standard prescribed by Section 314A.056(a)(1).

(b) Provides that all nonpublic documents produced for and testimony given to the attorney general under Subsection (a) are subject to the prohibitions on disclosure and use under Section 15.10(i) (relating to the disclosure and use of material and information), Business & Commerce Code.

(c) Authorizes the attorney general to seek an order from the district court compelling compliance with a civil investigative demand issued under this section.

Sec. 314A.202. ACTION TO REVOKE CERTIFICATE OF PUBLIC ADVANTAGE FOLLOWING CHANGED CIRCUMSTANCES. (a) Authorizes the attorney general, if, following annual review of a certificate of public advantage, the attorney general determines that as a result of changed circumstances the benefits resulting from a certified merger agreement as determined by Section 314A.056(a)(1)(A) no longer outweigh any disadvantages attributable to a reduction in competition resulting from the merger agreement, to bring an action in a district court in Travis County seeking to revoke the certificate of public advantage in accordance with the procedures prescribed by this section.

(b) Provides that, except as provided by Subsection (c), in an action brought under this section, the attorney general has the burden of establishing by clear and convincing evidence that as a result of changed circumstances the benefits resulting from the certified merger agreement and the unavoidable costs of



revoking the certificate of public disadvantage are outweighed by disadvantages attributable to a reduction in competition resulting from the merger agreement.

(c) Provides that in any action brought under this section, if the attorney general first establishes by clear and convincing evidence that the designated agency's certification was obtained as a result of material misrepresentation to the designated agency or the attorney general or as the result of coercion, threats, or intimidation directed toward any party to the merger agreement, then the parties to the merger agreement bear the burden of establishing by clear and convincing evidence that despite changed circumstances the benefits resulting from the certified merger agreement and the unavoidable costs of revoking the certificate of public advantage are not outweighed by disadvantages attributable by a reduction in competition resulting from the merger agreement.

SECTION 2. Requires the governor, as soon as practicable after the effective date of this Act, to designate a state agency under Section 314A.004, Health and Safety Code, as added by this Act.

SECTION 3. Effective date: September 1, 2019.