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H.B. No. 3301

A BILL TO BE ENTITLED

AN ACT

relating to merger agreements among certain hospitals; imposing fees.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

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

CHAPTER 314A. MERGER AGREEMENTS AMONG CERTAIN HOSPITALS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 314A.001. DEFINITIONS. In this chapter:

(1) "Attorney general" means the attorney general of Texas or any assistant attorney general acting under the direction of the attorney general of Texas.

(2) "Commission" means the Health and Human Services Commission.

(3) "Executive commissioner" means the executive commissioner of the Health and Human Services Commission.

(4) "Hospital" means a nonpublic general or special hospital licensed under Chapter 241 or a private mental hospital licensed under Chapter 577.

(5) "Merger agreement" or "merger" means an agreement among two or more hospitals for the consolidation by merger or other acquisition or transfer of assets by which ownership or control over substantially all of the stock, assets, or activities of one or more previously licensed and operating hospitals is placed under

1 the control of another licensed hospital or hospitals or another
2 entity that controls the hospitals.

3 Sec. 314A.002. APPLICABILITY. This chapter applies only to
4 a merger agreement among hospitals located within a county that:

5 (1) contains two or more hospitals; and

6 (2) has a population of:

7 (A) less than 100,000 and is not adjacent to a
8 county with a population of 250,000 or more; or

9 (B) more than 100,000 and less than 150,000 and
10 is not adjacent to a county with a population of 100,000 or more.

11 Sec. 314A.003. LEGISLATIVE FINDINGS AND PURPOSES; OTHER LAW
12 NOT AFFECTED. (a) The legislature finds that:

13 (1) a merger among hospitals may benefit the public by
14 maintaining or improving:

15 (A) the quality, efficiency, and accessibility
16 of health care services offered to the public; and

17 (B) the ability of hospital administrators to
18 operate health care facilities and take measures to improve public
19 health; and

20 (2) a merger among hospitals may provide the benefits
21 described by Subdivision (1) despite that it may be anticompetitive
22 within the meaning and intent of state and federal antitrust laws.

23 (b) The legislature believes it is in the state's best
24 interest to supplant state and federal antitrust laws with a
25 process for regulatory approval and active supervision by the
26 commission as provided by this chapter.

27 (c) Nothing in this chapter affects antitrust immunity that

1 may be provided through another provision of state law.

2 Sec. 314A.004. RULEMAKING. The executive commissioner
3 shall adopt rules for the administration and implementation of this
4 chapter by the commission.

5 SUBCHAPTER B. CERTIFICATE OF PUBLIC ADVANTAGE

6 Sec. 314A.051. REVIEW AND CERTIFICATION OF MERGER
7 AGREEMENTS REQUIRED. (a) Two or more hospitals may negotiate and
8 enter into a merger agreement, subject to approval by the
9 commission as provided by this subchapter.

10 (b) No merger agreement shall receive immunity under this
11 chapter unless the commission issues a certificate of public
12 advantage governing the merger agreement.

13 Sec. 314A.052. APPLICATION. (a) One or more parties to a
14 merger agreement may submit an application to the commission for a
15 certificate of public advantage governing the merger agreement.
16 The application must include a written copy of the merger agreement
17 and describe the nature and scope of the merger.

18 (b) If an applicant believes the documents or other
19 information required to be submitted with an application under
20 Subsection (a) contains proprietary information that is required to
21 remain confidential, the applicant shall:

- 22 (1) clearly identify the information; and
23 (2) submit duplicate applications, one application
24 that has complete information for the commission's use and one
25 redacted application that will be made available for public
26 release.

27 (c) A copy of the application and copies of all additional

1 related materials must be submitted to the attorney general and to
2 the commission at the same time.

3 Sec. 314A.053. APPLICATION FEE. The commission may assess
4 a fee for filing an application under Section 314A.052 in an amount
5 not to exceed \$75,000. The amount of the fee must be sufficient to
6 cover the reasonable costs of the commission and attorney general
7 in reviewing and approving or denying applications under this
8 subchapter.

9 Sec. 314A.054. REVIEW OF APPLICATION BY COMMISSION; GRANT
10 OR DENIAL OF APPLICATION. (a) The commission shall review an
11 application for a certificate of public advantage in accordance
12 with the standard prescribed by Section 314A.056(a).

13 (b) The commission shall grant or deny the application not
14 later than the 120th day after the date of the filing of the
15 application. The commission's decision must:

- 16 (1) be in writing;
17 (2) specify the basis for the decision; and
18 (3) provide a copy of the decision to the applicants on
19 the date of the decision.

20 Sec. 314A.055. REVIEW OF APPLICATION BY ATTORNEY GENERAL.

21 (a) The attorney general shall review an application for a
22 certificate of public advantage and all supporting documents and
23 information provided by the applicants. On completion of the
24 review and subject to Subsection (b), the attorney general shall
25 advise the commission whether the proposed merger agreement would
26 likely benefit the public and meet the standard prescribed by
27 Section 314A.056(a).

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

4 (c) If the attorney general advises the commission to deny
5 an application, the attorney general shall state the basis and
6 reasons for the recommended denial.

7 Sec. 314A.056. ISSUANCE OF CERTIFICATE OF PUBLIC ADVANTAGE.

8 (a) The commission, after reviewing the application and consulting
9 with the attorney general in accordance with Section 314A.055,
10 shall issue a certificate of public advantage for a merger
11 agreement if the commission determines under the totality of the
12 circumstances that:

13 (1) the proposed merger would likely benefit the
14 public by maintaining or improving:

15 (A) the quality, efficiency, and accessibility
16 of health care services offered to the public; and

17 (B) the ability of hospital administrators to
18 operate health care facilities and take measures to improve public
19 health; and

20 (2) the likely benefits resulting from the proposed
21 merger agreement described by Subdivision (1) outweigh any
22 disadvantages attributable to a reduction in competition that may
23 result from the proposed merger.

24 (b) In making the determination under Subsection (a), the
25 commission shall consider the effect of the merger agreement on the
26 following nonexclusive list of factors:

27 (1) the quality and price of hospital and health care

1 services provided to citizens of this state;

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

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

7 (4) the ability of health care payors to negotiate
8 payment and service arrangements with hospitals proposed to be
9 merged under the agreement; and

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

14 (c) The commission may include terms or conditions of
15 compliance in connection with a certificate of public advantage
16 issued under this subchapter if necessary to ensure that the
17 proposed merger likely benefits the public as specified in
18 Subsections (a)(1) and (2).

19 Sec. 314A.057. RECORDS. The commission shall maintain
20 records of all merger agreements the commission has approved under
21 this chapter, including any terms or conditions of issuing a
22 certificate of public advantage that are imposed by the commission.

23 Sec. 314A.058. TERMINATION OF CERTIFICATE OF PUBLIC
24 ADVANTAGE BY HOSPITAL. A hospital resulting from a merger
25 agreement approved under this chapter may voluntarily terminate its
26 certificate of public advantage by giving the commission notice at
27 least 30 days before the date of the termination.

1 (b) At least 90 days before the implementation of any
2 proposed increase in rates for inpatient or outpatient hospital
3 services and, if applicable, at least 60 days before the execution
4 of a reimbursement agreement with a third party payor, a hospital
5 operating under a certificate of public advantage shall submit to
6 the commission:

7 (1) any proposed increase in rates for inpatient and
8 outpatient hospital services;

9 (2) if applicable, any increase in reimbursement rates
10 under a reimbursement agreement with a third party payor; and

11 (3) any information concerning costs, patient volume,
12 acuity, payor mix, and other information requested by the
13 commission.

14 (c) After reviewing the proposed increase in rates
15 submitted under Subsection (b), the commission shall approve or
16 deny the proposed rate increase. The commission shall approve the
17 proposed rate increase if the commission determines that:

18 (1) the proposed rate increase likely benefits the
19 public by maintaining or improving:

20 (A) the quality, efficiency, and accessibility
21 of health care services offered to the public; and

22 (B) the ability of hospital administrators to
23 operate health care facilities and take measures to improve public
24 health; and

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

1 (d) If the commission determines that the proposed rate
2 inappropriately exceeds competitive rates for comparable services
3 in the hospital's market area, and that the proposed rate is
4 inconsistent with the standard prescribed by Section 314A.056(a),
5 the commission shall deny or modify the proposed rate increase.

6 (e) The commission shall notify the hospital in writing of
7 the commission's decision to approve, deny, or modify the proposed
8 rate increase not later than the 30th day before the implementation
9 date of the proposed increase.

10 Sec. 314A.103. ANNUAL REPORT. Each hospital operating
11 under a certificate of public advantage shall submit an annual
12 report to the commission. The report must include:

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

16 (2) if applicable, information about the hospital's
17 actions taken:

18 (A) in furtherance of any commitments made by the
19 parties to the merger; or

20 (B) to comply with terms imposed by the
21 commission as a condition for approval of the merger agreement;

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

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

27 (5) any other information required by the commission

1 to ensure compliance with this chapter, including information
2 relating to compliance with any terms or conditions for issuance of
3 the certificate of public advantage.

4 Sec. 314A.104. CORRECTIVE ACTION PLAN. (a) The commission
5 shall require a hospital operating under a certificate of public
6 advantage to adopt a plan to correct a deficiency in the hospital's
7 activities if the commission determines that an activity of the
8 hospital does not benefit the public as described by Section
9 314A.056(a) and no longer meets the standard prescribed by that
10 subsection.

11 (b) The corrective action plan must include each provision
12 required by the commission and must be submitted at the
13 commission's direction.

14 Sec. 314A.105. SUPERVISION FEE. The commission may assess
15 an annual supervision fee in an amount not to exceed \$75,000 against
16 each hospital operating under a certificate of public advantage
17 under this chapter. The amount of the fee must be sufficient to
18 cover the reasonable costs incurred by the commission in
19 supervising hospitals under this subchapter and in implementing and
20 administering this chapter.

21 SUBCHAPTER D. ENFORCEMENT AUTHORITY BY COMMISSION

22 Sec. 314A.151. INVESTIGATION; REVOCATION OF CERTIFICATE.
23 With respect to each hospital resulting from a merger agreement for
24 which the commission issued a certificate of public advantage under
25 this chapter, and to ensure that the hospital's activities continue
26 to benefit the public under the standard prescribed by Section
27 314A.056(a) and the purposes of this chapter, the executive

1 commissioner may:

2 (1) investigate the hospital's activities; and

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

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

9 (B) the commission's approval and issuance of the
10 certificate of public advantage was obtained as a result of
11 material misrepresentation;

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

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

17 Sec. 314A.152. JUDICIAL REVIEW OF COMMISSION ACTION. (a) A
18 person aggrieved by a decision of the commission in granting,
19 denying, or refusing to act on an application for a certificate of
20 public advantage submitted under Subchapter B or revoking a
21 certificate of public advantage issued under this chapter may
22 appeal the final order by filing a petition for judicial review in a
23 district court of Travis County.

24 (b) The filing of a petition for judicial review of a
25 decision by the commission to revoke a certificate of public
26 advantage stays enforcement of the commission's decision.

27 (c) Not later than the 45th day after the date a person files

1 a petition for judicial review under this section, the commission
2 shall submit to the district court the original copy or a certified
3 copy of the entirety of the commission's record regarding the
4 decision under review. By stipulation of all parties, the record
5 may be shortened. The district court may require or permit later
6 corrections or additions to the record. The district court may
7 extend the period prescribed by this subsection for submitting the
8 commission's record to the court.

9 (d) The district court shall conduct the review sitting
10 without a jury.

11 (e) The district court may reverse a decision by the
12 commission regarding revocation of a certificate of public
13 advantage if the court finds that the decision is:

14 (1) in violation of a constitutional or statutory
15 provision;

16 (2) in excess of the commission's statutory authority;

17 (3) made through unlawful procedure;

18 (4) arbitrary or capricious or characterized by abuse
19 of discretion or clearly unwarranted exercise of discretion; or

20 (5) unsupported by substantial and material evidence
21 in light of the record as a whole.

22 (f) Under Subsection (e)(5), in determining the
23 substantiality of the evidence, the district court:

24 (1) shall consider other evidence that detracts from
25 the substantiality; and

26 (2) may not substitute its judgment for the judgment
27 of the commission on the weight of the evidence as to a question of

1 fact.

2 (g) The district court shall issue a written decision
3 setting forth the court's findings of fact and conclusions of law.
4 The commission shall add the court's decision to the commission's
5 record.

6 SUBCHAPTER E. ATTORNEY GENERAL INVESTIGATION AND ENFORCEMENT

7 AUTHORITY

8 Sec. 314A.201. CIVIL INVESTIGATIVE DEMAND. (a) The
9 attorney general, at any time after an application is filed under
10 Section 314A.052 and before the commission makes a determination on
11 the application, or in connection with the commission's annual
12 review of a certificate of public advantage under Section 314A.059,
13 may require by civil investigative demand the attendance and
14 testimony of witnesses and the production of documents in Travis
15 County or the county in which the applicants are located for the
16 purpose of investigating whether the merger agreement satisfies or,
17 after issuance of the certificate of public advantage, continues to
18 satisfy the standard prescribed by Section 314A.056(a).

19 (b) All nonpublic documents produced for and testimony
20 given to the attorney general under Subsection (a) are subject to
21 the prohibitions on disclosure and use under Section 15.10(i),
22 Business & Commerce Code.

23 (c) The attorney general may seek an order from the district
24 court compelling compliance with a civil investigative demand
25 issued under this section.

26 Sec. 314A.202. ACTION TO REVOKE CERTIFICATE OF PUBLIC
27 ADVANTAGE FOLLOWING CHANGED CIRCUMSTANCES. (a) If, following an

1 annual review of a certificate of public advantage, the attorney
2 general determines that as a result of changed circumstances the
3 benefits resulting from a certified merger agreement as described
4 by Section 314A.056(a) no longer outweigh any disadvantages
5 attributable to a reduction in competition resulting from the
6 merger agreement, the attorney general may bring an action in a
7 district court in Travis County seeking to revoke the certificate
8 of public advantage in accordance with the procedures prescribed by
9 this section.

10 (b) Except as provided by Subsection (c), in an action
11 brought under this section, the attorney general has the burden of
12 establishing by clear and convincing evidence that as a result of
13 changed circumstances the benefits resulting from the certified
14 merger agreement and the unavoidable costs of revoking the
15 certificate of public advantage are outweighed by disadvantages
16 attributable to a reduction in competition resulting from the
17 merger agreement.

18 (c) In any action brought under this section, if the
19 attorney general first establishes by clear and convincing evidence
20 that the commission's certification was obtained as a result of
21 material misrepresentation to the commission or the attorney
22 general or as the result of coercion, threats, or intimidation
23 directed toward any party to the merger agreement, then the parties
24 to the merger agreement bear the burden of establishing by clear and
25 convincing evidence that despite changed circumstances the
26 benefits resulting from the certified merger agreement and the
27 unavoidable costs of revoking the certificate of public advantage

1 are not outweighed by disadvantages attributable to a reduction in
2 competition resulting from the merger agreement.

3 SECTION 2. This Act takes effect September 1, 2019.