

## **BILL ANALYSIS**

Senate Research Center  
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S.B. 1529  
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### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

Rural hospitals have been hit especially hard by the changing health care landscape. Rural communities face a greater challenge because of the large number of uninsured patients, the difficulty recruiting physicians, the toll of chronic disease, and the continuing opioid crisis. In Texas alone, 15 rural hospitals have closed since 2013.

To protect access to care and overcome these significant challenges, rural hospitals are seeking opportunities to work together and combine resources to tackle the critical health issues facing their communities. The proposed Certificate of Public Advantage (COPA) law helps secure the benefits of such collaborative agreements while reducing the prohibitive federal regulatory hurdles that prevent many hospital affiliation agreements today.

COPA is a legal framework that allows a state to approve a hospital merger only if the overall benefits of a merger outweigh any negative impacts. Once granted, COPA is closely monitored by the state to ensure strict compliance that the agreement continues to benefit the health care needs of the public. Additionally, COPA agreements may be terminated if a hospital is not meeting the terms of the agreement.

Under existing law, a merger approved by Texas authorities and supported by the local community may still be subject to a multimillion-dollar and years-long investigation, and possible lawsuit, by the Federal Trade Commission and the United States Department of Justice in Washington, D.C. Since rural hospitals cannot afford the cost or delay of such investigations, partnerships to improve rural healthcare are often abandoned before they begin.

The proposed COPA law takes final approval and oversight away from bureaucratic agencies in Washington, D.C., and empowers elected Texas officials to decide what is best for the state. This allows the legislature, statewide elected officials, and state agencies to monitor the implementation of a hospital merger which ensures it benefits the public's healthcare needs.

S.B. 1529 does not in any way approve a merger of two hospitals nor create any new regulations on Texas hospitals. A merger could only happen after an extensive application process, initiated by the hospitals, that involves the approval by the Texas attorney general and the Health and Human Services Commission.

As proposed, S.B. 1529 amends current law relating to merger agreements among certain hospitals and imposes fees.

### **RULEMAKING AUTHORITY**

Rulemaking authority is expressly granted to the executive commissioner of the Health and Human Services Commission in SECTION 1 (Section 314A.004, 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," "commission," "executive commissioner," "hospital," and "merger agreement" or "merger."

Sec. 314A.002. APPLICABILITY. Provides that this chapter applies only to a merger agreement among hospitals 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; OTHER LAW NOT AFFECTED. (a) Provides that the legislature finds that:

(1) a merger among hospitals to benefit the public by maintaining or improving the quality, efficiency, and accessibility of health care services offered to the public, and the ability of hospital administrators to operate health care facilities and take measure to improve public health; and

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

(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 Health and Human Services Commission (HHSC) as provided by this chapter.

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

Sec. 314A.004. RULEMAKING. Requires the executive commissioner of HHSC (executive commissioner) to adopt rules for the implementation and administration of this chapter by HHSC.

### 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 HHSC as provided by this subchapter.

(b) Requires that no merger agreement receive immunity under this chapter unless HHSC 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 HHSC 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 the applicant, if an 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 the duplicate applications, one application that has completed information for the commission's use and redacted application that will be made available for public use.

(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 HHSC at the same time.

Sec. 314A.053. APPLICATION FEE. Authorizes HHSC 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 HHSC and attorney general in reviewing and approving or denying applications under this subchapter.

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

(b) Requires HHSC to grant or deny the application not later than the 120th day after the date of the filing of the application. Requires HHSC'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 HHSC whether the proposed merger agreement would likely benefit the public and meet the standard prescribed by Section 314A.056(a).

(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 HHSC 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 HHSC, 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 HHSC determines under the totality of the circumstances that:

(1) 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 the ability of hospital administrators to operate health care facilities and take measures to improve public health; and

(2) the likely benefits resulting from the proposed merger agreement described by Subdivision (1) outweigh any disadvantages attributable to a reduction in competition that is authorized to result from the proposed merger.

(b) Requires HHSC, in making the determination under Subsection (a), 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 HHSC 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) and (2).

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

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 HHSC notice at least 30 days before the date of the termination.

Sec. 314A.059. ANNUAL REVIEW OF CERTIFICATE. (a) Requires HHSC 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 HHSC from completing its annual review of an approved certificate of public advantage under this section until:

(1) the attorney general informs HHSC 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 HHSC 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 HHSC 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 HHSC 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 increase 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 HHSC:

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

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

(3) any information concerning costs, patient volume, acuity, payor mix, and other information requested by HHSC.

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

(1) the proposed rate increase likely benefits the public by maintaining or improving the quality, efficiency, and accessibility of health benefit services offered to the public, and the ability of hospital administrators to operate health care facilities and take measures to improve public health; and

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

(d) Requires HHSC, if HHSC determines that the proposed rate inappropriately exceeds competitive rates for comparable services in the hospital's market area, and that the proposed rate is inconsistent with the standard prescribed by Section 314A.056 (a), to deny or modify the proposed rate increase.

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

Sec. 314A.103. ANNUAL REPORT. Requires each hospital operating under a certificate of public advantage to submit an annual report to HHSC. 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 HHSC 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 the health improvements of that population; and

(5) any other health information required by HHSC 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 HHSC 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 HHSC determines that an activity of the hospital does not benefit the public as described by Section 314A.056(a) and no longer meets the standards prescribed by that subsection.

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

Sec. 314A.105. SUPERVISION FEE. Authorizes HHSC to assess an annual supervision fee in an amount not to exceed \$75,000 against each hospital operating under a certificate of public advantage under this chapter.

#### SUBCHAPTER D. ENFORCEMENT AUTHORITY BY COMMISSION

Sec. 314A.151. INVESTIGATION; REVOCATION OF CERTIFICATE. Authorizes the executive commissioner, with respect to each hospital resulting from a merger agreement for which HHSC 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), 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 HHSC 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 hospitals' immunized activities;
  - (B) HHSC's approval and issuance of the certificate of public advantage was obtained as a result of material representation;
  - (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 COMMISSION ACTION. (a) Authorizes a person aggrieved by a decision of HHSC in granting, denying, or refusing to act on an application for a certificate of public advantage submitted under Subchapter B (Powers and Duties of Department) 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 commission to revoke a certificate of public advantage stays enforcement of HHSC's decision.
- (c) Requires HHSC, 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 HHSC'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 HHSC'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 HHSC 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 HHSC'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 HHSC 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 HHSC to add the court's decision to HHSC'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 HHSC makes a determination of the application, or in connection with HHSC's annual review of a certificate of public advantage under Section 314A.059, to require by civil investigative demand the attendance of witnesses and the production of documents in Travis County or the county in which the applicants are located for 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).

(b) Provides that all public 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) 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 provide 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 cost of revoking the certification of public disadvantage and outweighed by disadvantage attributable to a reduction in competition resolution 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 HHSC's certification was obtained as a result of material misrepresentation to HHSC 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. Effective date: September 1, 2019.