

LFC Requester:

Ruby Ann Esquibel

**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original _____ **Amendment** _____
Correction _____ **Substitute** _____ **X**

Date Prepared: 02/07/2024

Bill No: SB 15/SB 15
SHPAC

Sponsor: Katy Duhigg

Short Title: Health Care Consolidation
Oversight Act

Agency Name and Code Number: 305 – New Mexico
Department of Justice

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
 Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

This analysis is neither a formal Opinion nor an Advisory Letter issued by the New Mexico Department of Justice. This is a staff analysis in response to a committee or legislator’s request. The analysis does not represent any official policy or legal position of the NM Department of Justice.

BILL SUMMARY

Synopsis of Senate Bill 15 - Senate Health and Public Affairs Committee Substitute (February 3, 2024):

Senate Bill 15 - Senate Health and Public Affairs Committee Substitute (February 3, 2024) (“SHPAC Substitute”) makes substantial changes to the original language proposed in Senate Bill 15 (“SB 15”). *(See discussion below analyzing SB 15.)*

Primarily, the SHPAC Substitute narrows the Superintendent of Insurance’s (the “Superintendent”) oversight over all health care entity transactions by limiting the coverage of the Health Care Consolidation Oversight Act (the “Act”) to only transactions that involve New Mexico Hospitals licensed by the New Mexico Department of Health. The prior version of SB 15 gave the Superintendent broad authority to approve proposed transactions where at least one party to the transaction had an average annual revenue of twenty million dollars (\$20,000,000) or more in the immediately preceding three years or, in the case of a new entity, is projected to have at least ten million dollars (\$10,000,000) in average annual revenue over the first three years of operation at normal levels of operation or utilization. In the SHPAC Substitute, the approval authority is limited to mergers, acquisitions, or transactions resulting in changes in control.

Other significant changes noted in SHPAC Substitute include the following:

- References made to compliance under the Inspection of Public Records Act in the “Confidentiality” provision are removed in Section 4 of SHPAC Substitute.
- Section 5 from SB 15 titled “Intervention when final authority rests with another state” is removed in SHPAC Substitute. This language formerly gave the Superintendent the ability to place conditions on a health care entity whose health care transaction was approved in another state.
- SHPAC Substitute adds in Section 6 language that allows the Superintendent to grant immediate approval of a transaction if that transaction is deemed to be urgently necessary to maintain the solvency of a hospital or if there is an emergency that threatens the continued provision of immediate health care services. Prior language in SB 15 provided the Superintendent with exemption authority more broadly in an “emergency situation that threatens immediate health care services and the transaction is urgently needed to protect the interests of consumers.”
- Section 7 of SB 15 has been amended in SHPAC Substitute to remove the posting of

the proposed transaction and opportunity for public comment prior to approval.

Synopsis of Original Proposed Version of SB 15:

Senate Bill (“SB”) 15 would enact the Health Care Consolidation Oversight Act (the “Act”), which would authorize the review and approval of certain mergers, acquisitions, and changes in control of ownership of certain health care entities. The review of any health care proposed transaction would be performed by the State Superintendent of Insurance (the “Superintendent”), with additional limited consultation from the New Mexico Health Care Authority (the “Authority”) and, optionally, an ad hoc advisory committee. Following the performance of a comprehensive review, the Superintendent is charged with approving the proposed transaction, approving the proposed transaction with conditions or disapproving the proposed transaction. The Act provides criteria for how the review and evaluation shall be performed and how final determinations shall be made. The Act does not include the New Mexico Attorney General in the review process.

A. Health care entities subject to the Act

SB 15 defines “health care entity” as “a person that provides or supports the provision of health care services, including a health insurance entity, health care provider, health care provider organization, health care facility, management service organization or organization of health care providers or facilities.” SB 15’s broad oversight includes most private and public health care entities, providers, and facilities, with the categorical exclusion of long-term care facilities, adult daycare facilities, intermediate care facilities, boarding homes, child-care facilities and shelter care homes. Additionally, SB 15’s oversight would not extend to clinical trial collaborations, federally qualified health centers, agreements and contracts with an individual health care provider, or an employer that is not a health care entity that provides payment for health care services provided to its employees.

Oversight authority of the Superintendent is further limited monetarily to proposed transactions where at least one party to the transaction had an average annual revenue of twenty million dollars (\$20,000,000) or more in the immediately preceding three years or, in the case of a new entity, is projected to have at least ten million dollars (\$10,000,000) in average annual revenue over the first three years of operation at normal levels of operation or utilization.

B. Proposed transactions subject to review

A proposed “transaction” subject to review and approval under the Act would include the following transaction types:

- (1) a merger of a health care entity in New Mexico with another health care entity or any other person within or without the state;
- (2) an acquisition of one or more health care entities, one of which is in New Mexico or the acquisition of which may affect a health care entity in New Mexico;
- (3) any affiliation or contract that results in a change of control of a health care entity in New Mexico;
- (4) new contracts, new clinical affiliations or new contracting affiliations that may eliminate or significantly reduce essential services in New Mexico;
- (5) formation of a new corporation, partnership, joint venture, accountable care organization, parent organization or management services organization to provide health care services or to administer contracts with insurance carriers, third party administrators, pharmacy benefit managers or health care providers that affect New Mexico health care entities or health care service to New Mexico residents; and

(6) a sale, purchase, lease, new affiliation or transfer of control of a hospital located in New Mexico.

C. Written notice of proposed transaction

Prior to the completion of a proposed transaction, at least one person that is a party to the proposed transaction would be required to submit to the Superintendent a notice of the proposed transaction. The written notice must contain the following submittals:

- (1) a list of the parties involved in the transaction;
- (2) a statement describing the goals of the proposed transaction and whether and how the proposed transaction affects current and future health care services in New Mexico;
- (3) the geographic service area of any health care entity affected by the proposed transaction;
- (4) a description of the groups or individuals likely to be affected by the transaction; and
- (5) a summary of the health care services currently provided by any of the parties; commitments by the health care entity to continue those services; and any health care services that will be added, reduced or eliminated, including an explanation of why any services will be reduced or eliminated in the service area in which they are currently provided.

The expense of retaining any necessary experts, including actuaries, accountants, attorneys or other professionals who are qualified and have expertise in the type of transaction under review, would be borne by the party submitting the notice. Additionally, the Superintendent would be required to consult with the Authority about the potential effect of the proposed transaction as part of a preliminary review and incorporate the authority's review into the office's final determination.

D. Comprehensive review and final determination

In performing the comprehensive review of a proposed health care entity transaction under SB 15, the Superintendent is required to consider a number of different factors that may be affected by the proposed transaction:

- (1) the potential loss or change in access to essential services;
- (2) the accessibility of current and future health care services to any community affected by the transaction, including the accessibility of culturally responsive care;
- (3) the quality of current and future health care services provided to any of the communities affected by the transaction;
- (4) health care market share of a party and whether the transaction may foreclose competitors of a party from a segment of the market or otherwise increase barriers to entry in a health care market in New Mexico;
- (5) the labor market and competition for health care workers;
- (6) wages, salaries, benefits and working conditions of employees of health care entities;
- (7) employment protections, restrictions and other terms and conditions of employment for employees of health care entities;
- (8) patient costs;
- (9) payer costs;
- (10) health care provider networks;
- (11) health plan premiums and out-of-pocket costs;
- (12) cost trends and containment of total state health care spending;
- (13) access to services in medically underserved areas;

- (14) the functioning of the New Mexico markets for health care and health insurance;
- (15) the potential for the material change transaction to affect health outcomes for New Mexico residents;
- (16) consumer concerns, including complaints or other allegations against a health care entity that is a party to the transaction related to availability, accessibility, affordability and quality of care or coverage; and
- (17) any other factors the office determines to be in the public interest.

SB 15 rests authority with the Superintendent to approve or disapprove a proposed transaction after determining if the transaction benefits the public; will improve health outcomes for New Mexico residents; and is unlikely to result in a substantial reduction in the accessibility, affordability and quality of care for patients and consumers of health care services. The Superintendent would also retain post-transaction authority to monitor compliance with any conditions imposed upon approval to the proposed/approved transaction.

FISCAL IMPLICATIONS

No major budget-related fiscal implications noted, however, the Superintendent may require additional fiscal resources and FTE to perform the review required by the Act.

SIGNIFICANT ISSUES

Significant issues raised in SHPAC Substitute:

The biggest change between original SB 15 and SHPAC Substitute is the narrowing of authority the Superintendent can exercise under the Act. The original version of SB 15 gave the Superintendent broad authority to approve the transaction of any health insurance entity, health care provider, health care provider organization, health care facility, management service organization or organization of health care providers or facilities. By limiting oversight to Hospitals only, this change resolves some, but not all, of the concerns noted in the Department of Justice's prior analysis of SB 15 related to whether the Superintendent can exercise authority over entities that are not insurance companies and are not engaged in risk assumption. (See discussion below.) A constitutional amendment may still be required to expand the jurisdiction of the Superintendent since Article XI, Section 20 of the NM Constitution could be construed to preclude the Superintendent from regulating entities that are not insurers or engaged in risk assumption, such as Hospitals.

Another significant change in SHPAC Substitute, is the removal of public participation by posting proposed transactions on the Superintendent's website and allowing the public to comment. It was unclear in the original version of SB 15 how public participation was to be considered in approving or disapproving a health care entity transaction.

Prior Significant Issues Raised in SB 15

The National Academy for State Health Policy ("NASHP") notes that "a growing body of evidence demonstrates that health care consolidation leads to higher health care costs with little to no increase in quality." See [https://nashp.org/a-tool-for-states-to-address-health-care-consolidation-improved-oversight-of-health-care-provide r-mergers/](https://nashp.org/a-tool-for-states-to-address-health-care-consolidation-improved-oversight-of-health-care-provide-r-mergers/). For these reasons, a growing number of states have adopted legislation similar to SB 15 that seeks to provide state health agencies and attorneys general with more oversight of proposed health care entity transactions. To assist, NASHP has drafted a

model act for state legislatures to consider for adoption that compares similarly to SB 15. See <https://nashp.org/a-model-act-for-state-oversight-of-proposed-health-care-mergers/>.

One important consideration, the NASHP model act and other states who have adopted oversight legislation (i.e. Connecticut, Massachusetts), generally give authority to approve proposed health care entity transactions to their state attorneys general. SB 15 as currently proposed, does not include the New Mexico Attorney General, the New Mexico Department of Justice within those governmental entities vested with providing review, oversight, and consultation under the Act. While state attorneys general around the country generally retain authority to bring anti-trust lawsuits that may have a significant impact to the public, legislation, such as SB 15, should provide a mechanism by which attorneys general are required to receive notice of a proposed transaction rather than receiving notice through happenstance.

SB 15 does not provide any governmental entity with rule-making authority to develop regulations that may aid with carrying out the provisions of the Act. SB 15 lists comprehensive factors the Superintendent shall consider during the review to determine whether a proposed transaction should be approved or denied. Certain factors to be considered (i.e. whether a proposed transaction results in a potential loss or change in access to essential services, or what constitutes an improvement in health outcomes) could be difficult to evaluate without further clarification as to how such a determination is to be made. Vesting an agency with rule-making authority under SB 15 could provide more efficiency to the review process and give the public and affected health care entities a meaningful opportunity to participate in the process.

One other concern presented by SB 15 arises because of the proposed role of the Superintendent in the review and approval process. The Office of the Superintendent of Insurance was established by constitutional amendment. Article XI, Section 20 of the New Mexico Constitution provides that the Office of the Superintendent “shall regulate insurance companies and others engaged in risk assumption in such manner as provided by law.” SB 15 purports to give the Office of the Superintendent regulatory authority over entities that are not insurance companies and are not engaged in risk assumption. Specifically, SB 15 proposes that the Superintendent regulate participants in health care delivery businesses. A constitutional amendment would be required to expand the jurisdiction of the Superintendent. Because Article XI, Section 20 could be construed to preclude the Superintendent from regulating entities that are not insurers or engaged in risk assumption, SB 15 may be subject to legal challenge by newly regulated entities.

PERFORMANCE IMPLICATIONS

None noted.

ADMINISTRATIVE IMPLICATIONS

The Superintendent may need to consider the number of FTE necessary to perform the functions of the Act.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SHPAC Substitute is a committee substitute of Senate Bill 15.

TECHNICAL ISSUES

None noted.

OTHER SUBSTANTIVE ISSUES

None noted.

ALTERNATIVES

None noted.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

If SB 15 is not enacted, any potential contracts and agreements that may have anti-trust implications will continue to be subject to the New Mexico Anti-Trust Act (NMSA 1978, §§ 57-1-1 et. seq.), which allows the Attorney General and any person threatened with injury to bring anti-trust actions.

AMENDMENTS

SHPAC Substitute is a committee substitute of Senate Bill 15.