

Senate Bill No. 317 - Third Reading

Bill Summary

Prepared at the request of Sen. Greg Lind
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This summary is not a legal analysis and is intended to be descriptive in nature only.

An Act regulating the conversion of a nonprofit health entity to a for-profit corporation or entity or a mutual benefit corporation or entity; providing definitions; providing for approval by the Attorney General and the State Auditor; providing criteria for approval; providing for public records, notice, and hearing; providing for experts and costs; providing procedures and rulemaking authority; providing for distribution of proceeds of a conversion transaction; amending sections 35-2-609 and 35-2-617, MCA; and providing an immediate effective date and an applicability date.

Section 1. Definitions. Defines terms including control or governance, conversion or conversion transaction, fair market value, ordinary course of business, public assets, transferee, and transferor.

Section 2. Conversion transaction -- approval. Requirement that any conversion transaction must be approved by the Commissioner of Insurance and the Attorney General.

Section 3. Rulemaking authority. Provides rulemaking authority for the Commissioner and the Attorney general regarding the notice, the procedures by which proprietary business information and trade secrets are protected from public disclosure, and hearing and appeal procedures. Rulemaking authority is included for proprietary information and trade secrets because section 6 provides that all documents and records except for proprietary information or trade secrets are public records.

Section 4. Rights and powers. This section clarifies that nothing in this bill is intended to impair the traditional rights and powers of the attorney general or the courts with respect to charitable assets. It also clarifies that if there is disagreement over whether an action is a conversion transaction or a transaction in the ordinary course of business, that the attorney general or the commissioner may seek a declaratory judgment from the courts.

Section 5. Application process -- content. This section provides for an application to be filed with the commissioner and a copy to be filed with the attorney general. This section specifies the contents required in an application, including information on the terms of the proposed conversion transaction, valuation of all consideration exchanges, the extent to which assets are public assets, a financial and community impact analysis report, independent valuation of the fair market value, and an antitrust analysis.

Section 6. Public records. This section provides that the contents of the application submitted to the commissioner are a public record, except that any proprietary information or trade secret that may be law be kept confidential.

Section 7. Receiving an application -- notice of application. The commissioner is required to publish a notice if the application within 15 working days of receipt of an application and lists the requirements of the notice.

Section 8. Public hearing. This section contains the requirement for a public hearing within 90 days after receiving an application and allows for public comment or exhibits at the public hearing.

Section 9. Procedures. This sections set out the procedures for the public hearing, including the person presiding the hearing, that certain sections of law regarding contested case hearings apply to this public hearing, application of the laws regarding discovery and evidence, and providing for public comments and how they may be considered.

Section 10. Experts. This section allows the commissioner or the attorney general to contract with experts on certain elements of the conversion transaction and that the transferor and transferee must each pay half of the expenses.

Section 11. Deadline for approval or nonapproval. This section provides that the commissioner and the attorney general each have 60 days to issue a separate order approving or disapproving the transaction. Two 60-day extensions are allowed.

Section 12. Effect of determination. The determinations made by the commissioner and attorney general become effective on the date when both have issued orders.

Section 13. Criteria for attorney general approval of conversion transaction. This section gives the criteria that the attorney may use to determine whether a conversion transaction is in the public's interest. The attorney general's concern mainly regards the protection of the fair market value of public assets and that the parties to the transaction do not directly or indirectly inure to parties to the conversion transaction. This section contains a critical subsection that states that there is a rebuttable presumption that the assets of a nonprofit health entity are public assets. This means the burden of proof is on the transferring nonprofit health entity to prove that they are not public assets if they believe them not to be public assets. (Without this presumption, it would be the state's burden of proof that they are public assets.)

Section 14. Criteria for distribution of assets. This section requires that the public assets must be in a form that is cash or readily converted to cash. This section allows the attorney general to determine whether or not the transaction is a conversion transaction for fair market value and provides guidelines by which to determine fair market value.

Section 15. Criteria for commissioner approval of conversion transaction. This section provides the criteria by which the commissioner of insurance determines whether a conversion transaction is in the public interest. The commissioner's concern mainly is whether the decision by the transferor was made with due diligence, the procedures that were used including whether expert assistance was used, looking at conflicts of interest of the parties, the effect on the availability and accessibility of health care services or health insurance coverage and affordable health care, if any management contract is for reasonable value, and whether the conversion transaction is equitable and in compliance with the laws regarding health service corporations and health maintenance corporation.

Section 16. Deposit of assets. This section requires assets of a conversion transaction to be distributed as provided in [section 18].

Section 17. For-profit health entity. This sections requires that if a corporation wishes to change its corporate status by virtue of a conversion transaction, that must be provided for in the conversion transaction. All filings in existence at the time of a conversion transaction continue in full force and effect upon a conversion transaction if the corporation remains qualified to engage in business in the state.

Section 18. Distribution of proceed -- annual report. This section provides that the proceeds of a conversion transaction that are public assets must be distributed to an existing or new foundation or other nonprofit organization to be held in a trust that meets certain requirements, such as its corporate status, similar mission, not to supplant government funds, the parties must remain independent of the foundation or nonprofit, avoid conflicts of interest, and qualifications of its board members. They must provide an annual report to the commissioner and the attorney general and the commissioner and attorney general both retain oversight and monitoring authority.

Sections 19 and 20. 35-2-609 and 35-2-617. These statutes are existing law regarding public benefit corporations and provide that a public benefit corporation or a religious corporation that is considered a nonprofit health entity are subject to the new conversion transaction law in this bill.

Section 21. Codification. New sections in this bill will be codified in the title and chapter regarding Health Care Policy. (Currently includes the certificate of public advantage process under the Department of Justice that health care facilities and physicians must undergo for cooperative agreements, mergers, and consolidations.)

Section 22. Effective date. This bill will be effective on passage and approval.

Section 23. Applicability. This section provides that the provisions of this bill cannot have an effect on any conversion transaction completed before this bill takes effect, except that transactions or a series of transaction that were made prior to this bill taking effect can be

reviewed in an application for a conversion transaction (to determine the public assets and their fair market value, etc.) Other existing statutory authority of the attorney general or commissioner may be implemented, however.

Proposed Amendments:

SB031704.asb (the consensus amendments on 3/11/05)

Amendments #1 and #4 clarify that the treatment of the proceeds of public assets are also included in the exclusions from the definition of "conversion transactions".

Amendment #2 clarifies the types of cash equivalents that if purchased, sold or transferred in the ordinary course of business are not considered in the definition of "conversion transaction."

Amendment #3 is included to exclude from the definition of "conversion transaction" a type of transfer of assets between nonprofit public benefit corporations and nonprofit mutual benefit corporations when the members of the mutual benefit are public benefit corporations if the assets are managed consistent with a public benefit purpose.

Amendments #5 and #6 clarifies that the attorney general has existing rights and powers over assets of a public benefit corporation, not just during dissolution, and that this bill does no impair or change those rights.

Amendment #7 replaces the current subsection (2) to provide authority and limits on attorney general, the commissioner or a nonprofit health entity seeking declaratory judgments in district court regarding whether or not a transaction is a conversion transaction, and how to proceed if it is declared a conversion transaction in either event that the conversion transaction has not been completed or if it has been completed. New subsection (3) clarifies the applicability of this law regarding the ability to void or require any distribution of assets with respect to transactions completed before this date takes effect.

Amendments #8 and 9 provide clarity as to how to handle the proceeds of a conversion transaction when the public assets that are in the conversion belong to the public benefit corporation members of a mutual benefit corporation. The public assets may be distributed back to the public benefit members if they provide in the mutual benefit corporation's articles of incorporation that the assets from a conversion transaction be distributed back to the public benefit corporation members (which keeps the assets as public assets) and then they do not need to be placed in a foundation or other nonprofit entity.

Amendment #10 strikes language that was basically a reiteration of the law and the new language in amendment provides a process under which this concern may be addressed through a

declaratory judgment in court.

Amendment #11 clarifies that this law does not apply to individual transactions or series of transactions in addition to a conversion transaction before this act is effective, but they may be considered in an application for a conversion transaction after the effective date, limited by the provisions in amendment #7.

SB031705.asb (new amendments since 3/11/05)

Amendment #1, #4, #5, and #10. Amendment #10, brings in another existing section of law that requires notice to the attorney general when a nonprofit seeks to dissolve, and complements the amendment #5. This provides notice in Title 35 that certain nonprofits are subject to this bill which is being codified in Title 50 and the information in amendment #5 provides that if you are complying with the provisions of this bill that will be codified in Title 50, you are complying with certain requirements in Title 35. These amendments seek to provide the public with clear direction on how the statutes work together.

Amendment #2 clarifies that the concern here is a transfer of power not just and exercise of power of a board of directors.

Amendment #3 corrects confusing language from a previous amendment to the definition of "ordinary course of business."

Amendment #6 and #7. With the addition of amendment #7 from SB031704.asf providing for a court to make a declaratory judgment, this language provides that if a court says that it doesn't involve public assets, that the attorney general and commissioner cannot disapprove a conversion transaction.

Amendments #8 and #9. Provides that the section on distribution of assets also applies if the conversion transaction is between parties other than for-profit companies (i.e. nonprofit mutual benefit corporations or religious corporations).

SB031706.asb - Combined set of amendments containing SB031704.asb and SB031705.asb.

