

Proposed Amendments  
Senate Bill No. 317  
Introduced Bill

EXHIBIT NO. 11  
DATE: 2-11-05  
BILL NO. SB317

Requested by Blue Cross Blue Shield of Montana  
Prepared by Greg Gould

1. Page 1, line 19

Following: line 18

Insert: "(2) "Control" or "governance" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services or otherwise unless the power is solely the result of an official position with or a corporate office held by the person."

Renumber: subsequent subsections

*The key terms "control" and "governance" are not defined in the bill. The proposed definition comes from 33-2-1101.*

2. Page 1, line 20

Following: "conveyance"

Strike: "conversion"

*Present language defines a "conversion" as a "conversion."*

3. Page 1, line 21

Following: "disposition"

Insert: "by a nonprofit health entity or another person or entity"

*Clarifying amendment.*

4. Page 1, line 21

Following: "governance"

Insert: "to a person or entity other than the nonprofit health entity"

*Clarifying amendment.*

5. Page 1, line 22

Following: "more than 10% in"

Strike: "full"

*Conform to revised value concept – see amendments # 13 and 55, below.*

6. Page 1, line 23

Following: "entity amounting to a"

Strike: "full"

*Conform to revised value concept – see below.*

7. Page 1, lines 25-26

Following: "related transactions."

Strike: "A change in the service area of the nonprofit health entity is considered a substantial change in the mission."

Insert: "In determining the value of a tangible asset under this definition, the value of the asset shall be calculated net of any mortgage, lien, or other encumbrance on the asset that exists of record."

*The bill language regarding change in service area would preclude ordinary business activities, and would, for example, preclude participation in Medicare Advantage regional PPO. Assets should be valued net of encumbrances.*

8. Page 1, line 29

Following: "mission"

Strike: ", including but not limited to"

Insert: "and does not include a transaction or series of transactions if the purpose, intent or effect of the transaction or series of transactions is not or was not to convert the nonprofit health entity from a nonprofit to a for-profit entity or to transfer the nonprofit health entity's nonprofit business or operations to a for-profit entity.

(d) "Conversion" or "conversion transaction" does not include

*This language is necessary to assure that the provisions of the bill are not used to interfere in the ordinary, daily transactions of a nonprofit health entity that are not a conversion or part of a conversion.*

9. Page 2, line 4

Following: "encumbrance;"

Strike: "or"

Insert: "(ii) Awards, grants or payments to or on behalf of intended members or beneficiaries, consistent with the lawful purposes of a nonprofit health entity;

(iii) A change in the membership of the board of directors or officers of the nonprofit health entity or a wholly owned subsidiary of the nonprofit health entity, provided that the change in membership does not result in a change in the nonprofit corporate status of the nonprofit health entity, does not result from a transfer of control, governance or ownership of the nonprofit health entity, and does not result from exercise of a power of appointment of directors or officers of the nonprofit health entity or a wholly owned subsidiary of the nonprofit health entity;

(iv) settlement, satisfaction or payment of a claim, suit or debt, incurred in the ordinary course of business, against or of the nonprofit health entity or a wholly owned subsidiary of the nonprofit health entity;

(v) execution of a promissory note, guaranty, or other evidence of indebtedness for the amount of a loan, the proceeds of which are paid solely to the nonprofit health entity or a wholly owned subsidiary of the nonprofit health entity;

(vi) any payment, transfer or other transaction required by law or by order of any authorized administrative officer or agency, including but not limited to payment of taxes, fees, fines, penalties or other assessments to a government or nonprofit entity, or a transaction ordered by the commissioner or the attorney general;

(vii) Purchases, sales or transfers in the ordinary course of business for fair market value of cash or cash equivalents owned by the nonprofit health entity or any wholly owned subsidiary in exchange for goods, products, services or an interest in property, including but not limited to securities as defined in 30-10-103, MCA, to be held by the nonprofit health entity or its wholly owned subsidiary;”

*Provide necessary exceptions to allow usual operations and transactions that are not conversions.*

10. Page 2, line 5

Before: “sale, investment, or transfer”

Strike: “(ii)”

Insert: “(viii)”

*Renumber subsections.*

11. Page 2, line 7

Following: “subsidiary”

Strike: “.”

Insert: “; or”

*Renumber subsections.*

12. Page 2, line 8

Following: line 7

Insert: “(ix) any other transaction or proposed transaction for fair market value, if:

(I) the nonprofit health entity or its wholly owned subsidiary retains or will retain substantially the same degree of control, governance or ownership of the proceeds of the transaction that the nonprofit health entity or its wholly owned subsidiary held in the assets or operations prior to the transaction or proposed transaction;

(II) the nonprofit health entity maintains its operations as a nonprofit health entity; and

(III) None of the assets or operations of the nonprofit health entity or its wholly owned subsidiary inure or will inure directly or indirectly to the benefit of any officer, director, trustee or employee of the nonprofit health entity or its wholly owned subsidiary, except as reasonable compensation for necessary services performed on behalf of the nonprofit health entity or its wholly owned subsidiary.”

*Provide necessary exceptions to allow usual operations and transactions that are not conversions.*

13. Page 2, lines 8 – 12

Following: “(3)”

Strike: “‘Full fair market value’ means the most likely value or range of values at sale that tangible or intangible assets would have in a competitive and open market assuming conditions requisite to a fair sale, with buyer and seller acting with prudence, knowledge, and in their own best interests and with a reasonable time available to publicize the sale on the open market. The full fair market value may not be less than the independent appraisal of full fair market value.”

Insert: “‘Fair Market Value’ means fair market value, as of the date of the transaction or proposed transaction, as determined by an independent appraisal of the assets or operations, performed and communicated by a qualified appraiser according to applicable professional appraisal standards.”

*Asset values should be determined by independent, qualified appraisers applying applicable professional standards, rather than in the political arena by politicians not bound by professional standards and who could use the language to arrive at unrealistic valuations that would not be paid in an arms length transaction.*

14. Page 2, line 14

Following: line 13

Insert: “(6) ‘Health service corporation’ has the meaning provided for in 33-30-101.

Renumber subsequent subsections

*Add definition of health service corporation.*

15. Page 2, line 19

Following: line 18

(8) “Ordinary course of business” means with respect to a transaction or disposition that the transaction comports the usual and customary practices in the kind of business in which the nonprofit health entity is engaged or with the nonprofit health entity’s own usual or customary practices.”

Renumber subsequent subsections.

*Defines critical term, using definition from commercial code.*

16. Page 2, line 20

Strike: “(a) assets held for the benefit of the public or the community;”

Renumber subsequent subsections

*Delete vague, undefined and subjective language that could be used by regulators to convert private assets into public assets.*

17. Page 3, lines 2 – 3

Following: "commissioner" on line 2  
Strike: "and the attorney general issue orders"  
Insert: "issues an order"

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

18. Page 3, line 5  
Following: "commissioner"  
Strike: "and the attorney general"

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

19. Page 3, lines 9 - 10  
Following: "under which"  
Strike: "information may be considered"  
Following: "business information"  
Strike: "or"  
Insert: "and"  
Following: ""trade secrets"  
Insert: "are protected from public disclosure"

*Provide for protection of information currently protected by law from public disclosure.*

20. Page 4, line 1  
Following: "(g)"  
Insert: "if the proposed conversion transaction is a proposed acquisition of the nonprofit health entity,"  
Following: "valuation of the"  
Strike: "full"

*Limit the requirement for a valuation of the entire nonprofit health entity to the stated circumstance, i.e., a proposed acquisition.*

21. Page 4, line 3  
Following: "nonprofit health entity;"  
Insert: "and"

22. Page 4, line 4  
Following: "appropriate expert"  
Strike: "; and"  
Insert: "."

23. Page 4, line 5  
Strike: "(i) any other documents relating to the conversion transaction."

*21 – 23: Delete vague and unlimited document filing requirement.*

24. Page 4, line 8  
Following: “information as defined by”  
Strike: “rule”  
Insert: “law”  
Following: commissioner”  
Strike: “or attorney general”

25. Page 4, lines 11- 12  
Following: “applicable state law.”  
Strike: “The contents of the application submitted to the commissioner pursuant to [section 5] are a public record.”

*24 – 25: Proprietary and trade secret information should have the protection afforded by law. This protection should not be left to the discretion of political officials.*

26. Page 5, line 3  
Following: line 2  
Strike: “and the attorney general”  
Following: “shall”  
Strike: “agree on and jointly”

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

27. Page 5, line 4  
Following: “commissioner,”  
Strike: “attorney general”

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

28. Page 5, line 6  
Following: “as provided in”  
Insert: “2-4-601, 2-4-603,”  
Following: “2-4-612,”  
Insert: “2-4-613,”

*The provisions of MAPA regarding notice, informal disposition and settlement, and ex parte communications should apply to these proceedings.*

29. Page 5, line 9  
Following: “commissioner”  
Strike: “and attorney general”

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

30. Page 5, line 12

Following: "commissioner"

Strike: "and the attorney general"

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

31. Page 5, lines 13-15

Following: "cross examination"

Insert: "."

Strike: "or the commissioner or the attorney general makes a specific finding that the factual information meets the requirements of Rule 804(b)(5) of the Montana Rules of Evidence."

*No testimony should be relied upon unless the affected parties have been afforded the constitutional right to confront the witnesses.*

32. Page 5, line 17

Following: "commissioner"

Strike: "or the attorney general, or both,"

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

33. Page 5, line 20

Following: "valuation of"

Strike: "full"

*Conform to revised value concept – see amendments # 13 and 55, below.*

34. Page 5, line 26

Following: "reasonably"

Insert: "and necessarily"

35. Page 5, line 27

Following: "expert's services"

Insert: ", but the transferor and transferee together may not be required to pay any amount that exceeds 5% of the fair market value of the assets that are the subject of the proposed conversion transaction"

*34 – 35: There need to be limits on the amount of cost the state can incur at the expense of other parties.*

36. Page 5, line 30  
Following: "commissioner"  
Strike: "and the attorney general"

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

37. Page 6, line 30  
Before: "issue"  
Strike: "each"  
Following: "issue"  
Strike: "a separate"  
Insert: "an"

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

38. Page 6, line 4  
Following: "commissioner"  
Strike: "and the attorney general do not both"  
Insert: "does not"

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

39. Page 6, line 6  
Following: "commissioner"  
Strike: "or the attorney general"

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

40. Page 6, line 8  
Following: "commissioner"  
Strike: "and the attorney general are"  
Insert: "is"

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

41. Page 6, lines 11 and 12  
Following: "commissioner" on line 11  
Strike: "and the attorney general"

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

42. Page 6, line 12  
Following: "become effective"  
Strike: "90 calendar days after"  
Insert: "on"

43. Page 6, lines 12 – 13  
Following: "date"  
Strike: "on which the determination is made or when ratified or rejected by the legislature, whichever is earlier"  
Insert: "of the commissioner's order issued under [section 11]"

*42 – 43: The orders should be effective when both have been issued. The concept of legislative intervention is suggested but not developed and would unnecessarily delay transactions.*

44. Page 6, line 15  
Following: "Criteria for"  
Strike: attorney general"  
Insert: "commissioner"

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

45. Page 6, line 16  
Before: "may not approve"  
Strike: "attorney general"  
Insert: "commissioner"

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

46. Page 6, line 17  
Following: "public interest"  
Insert: ", after considering the factors specified in [section 15] and in accordance with the requirements of this section"

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

47. Page 6, line 18  
Following: "public interest, the"  
Strike: "attorney general"  
Insert: "commissioner"

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

48. Page 6, line 20  
Following: "(a) the"  
Strike: "full"

*Conform to revised value concept – see amendments # 13 and 55, below.*

49. Page 6, line 21  
Following: "(b) the"  
Strike: "full"

*Conform to revised value concept – see amendments # 13 and 55, below.*

50. Page 6, line 23  
Following: "(c) the"  
Strike: "full"

*Conform to revised value concept – see amendments # 13 and 55, below.*

51. Page 6, line 28  
Following: "by the"  
Strike: "attorney general"  
Insert: "commissioner"

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

52. Page 6, line 30  
Following: "except for the"  
Strike: "fair"  
Insert: "reasonable"

*The word "fair" is too subjective. The word "reasonable" has more significance in this context.*

53. Page 7, lines 2 – 3  
Strike: "(3) For purposes of the attorney general's review under 35-2-609, 35-2-617, and this section, there is a rebuttable presumption that the assets of a nonprofit health entity are public assets."

*Deletes this unfair and perhaps unconstitutional presumption.*

54. Page 7, line 9  
Before: "may determine"

Strike: "attorney general"

Insert: "commissioner"

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

55. Page 7, lines 12 – 21

Strike: "(3) In determining full fair market value, the attorney general may consider all relevant factors, including, as determined by the attorney general:

(a) the value of the nonprofit health entity or an affiliate or the assets of the nonprofit health entity or affiliate that are determined as if the nonprofit health entity or affiliate had voting stock outstanding and 100% of its stock was freely transferable and available for purchase without restriction;

(b) the value as a going concern;

(c) the market value;

(d) the investment or earnings value;

(e) the net asset value; and

(f) a control premium, if any."

*Again, asset values should be determined by independent, qualified appraisers applying applicable professional standards, rather than in the political arena by politicians not bound by professional standards and who could use the language to arrive at unrealistic valuations that would not be paid in an arms length transaction. All of these factors are addressed by professional standards, based upon the specific type of property and the circumstances of the appraisal. The AG should not be permitted to pick and choose the more desirable valuation, regardless of valuation standards and rules.*

56. Page 7, line 23

Following: "Section 15."

Insert: "Factors to be considered in determining whether"

Strike: "Criteria for commissioner approval of"

Following: "conversion transaction"

Insert: "in public interest"

*Revise section title to more accurately reflect section contents.*

57. Page 8, line 8

Following: "transaction is for"

Strike: "fair"

Insert: "reasonable"

*The word "fair" is too subjective. The word "reasonable" has more significance in this context.*

58. Page 8, lines 26 – 27

Following: "commissioner" on line 26

Strike: “and the attorney general”

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

59. Page 9, line 9

Following: “conversion transaction”

Insert: “that are public assets”

*Consistent with the other provisions of the bill, only the assets that are public assets should be distributed in the event of a conversion.*

60. Page 11, lines 21 – 24

Following: “[sections 1 through 18].”

Strike: “A nonprofit corporation that was previously known as a public benefit corporation but did not receive approval of a district court or provide notice to the attorney general, as provided in subsection (1), is considered to be a public benefit corporation.”

*This cryptic language appears to be an impermissible and inappropriate attempt to retroactively legislate the outcome of a matter that is in dispute, subject to pending litigation and settlement negotiations.*

61. Page 13, line 7

Strike: “Title 50, chapter 4” in both places it occurs

Insert: “Title 33, chapter 1” in both places

*Provide for regulation of conversion transactions by a single regulatory agency, the commissioner, who routinely regulates the subject entities.*

62. Page 13, line 12

Following: “applies prospectively to”

Strike: “and”

Insert: “transactions completed on or after [the effective date of this act]. [This act]”

63. Page 13, line 13

Following: “conversion transaction”

Insert: “or any individual transaction or related series of transactions”

64. Page 13, lines 13 – 15

Following: “[the effective date of this act]”

Strike: “, except that a transaction or series of transactions made prior to [the effective date of this act] may be considered in any application for a conversion transaction made after [the effective date of this act]”

*62 – 64: The current bill language impermissibly would permit application of the substantive provisions of the act retroactively to lawful transactions completed before the effective date of the act.*

-END-

