

SENATE BILL NO. 407

INTRODUCED BY C. VINCENT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING TAX-EXEMPT STATUS REQUIREMENTS AND OBLIGATIONS FOR CERTAIN NONPROFIT PHARMACY OPERATIONS; ELIMINATING TAX-EXEMPT STATUS AND IMPOSING A FINE IN LIEU OF TAX FOR NONPROFIT PHARMACIES THAT OPERATE A COMMERCIAL ENTERPRISE BY UTILIZING THE FEDERAL 340B DRUG DISCOUNT PROGRAM; DEFINING COMMERCIAL PHARMACY ENTERPRISE; PROVIDING RULEMAKING AUTHORITY; AMENDING SECTIONS 15-6-201, 15-31-102, AND 35-2-118, MCA; AND PROVIDING AN APPLICABILITY DATE."

WHEREAS, the federal 340B drug discount program was designed by Congress to help safety net providers improve access to prescription medicines for uninsured, vulnerable patients in the outpatient hospital setting; and

WHEREAS, some hospitals that qualify for the program claim 340B discounts for most outpatient prescription drugs, for both insured and uninsured patients; and

WHEREAS, the 340B discount drug program is not intended to subsidize covered entities for providing inpatient services to those who are covered by private insurance and Medicare; and

WHEREAS, instead of using the deeply discounted drugs hospitals receive for the most vulnerable in need, some hospitals are selling those drugs to patients with private insurance and Medicare for a cheaper cost than local pharmacies, or alternatively, selling the drugs at retail price and keeping the profits; and

WHEREAS, not-for-profit pharmacies should not be permitted to run taxpaying pharmacies out of business; and

WHEREAS, not-for-profit pharmacies that utilize the federal 340B drug discount program are unique and separate entities that must be classified differently for purposes of taxation than other not-for-profit entities that provide charity care; and

WHEREAS, Article VIII, section 5, of the Montana Constitution provides the Legislature with the power to amend current statutory exemptions from taxation.

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

1 **NEW SECTION. Section 1. Nonprofit pharmacies in competition with commercial pharmacies --**
2 **revocation of tax-exempt status.** (1) The department shall:
3 (a) revoke the tax-exempt status of a nonprofit corporation or an institution of purely public charity, as
4 defined in 15-6-201, that engages in a commercial pharmacy enterprise;
5 (b) revoke the property tax exemption on any real or personal property or portion of real or personal
6 property used in conducting the commercial pharmacy enterprise; and
7 (c) assess a fine calculated under the provisions of [section 2] for any year that a nonprofit corporation
8 or an institution of purely public charity engages in a commercial pharmacy enterprise.
9 (2) As used in this section, the following definitions apply:
10 (a) "340B program" means a federal discount drug program that is administered under section 340B of
11 the Public Health Service Act, 42 U.S.C. 256B.
12 (b) "Commercial pharmacy enterprise" means a nonprofit corporation or an institution of purely public
13 charity that:
14 (i) receives discount drugs pursuant to a 340B program;
15 (ii) is in direct competition with a for-profit pharmacy;
16 (iii) claims 340B discounts for most outpatient prescription drugs for privately insured and uninsured
17 patients;
18 (iv) subject to subsection (5), sells at least 10% of prescription drugs to privately insured patients at a cost
19 that is less than the cost of purchasing prescription drugs outside the 340B program;
20 (v) subject to subsection (5), sells at least 10% of prescription drugs to privately insured patients at a cost
21 that is more than the cost of purchasing prescription drugs inside the 340B program; and
22 (vi) uses paid staff rather than volunteers.
23 (3) The department shall:
24 (a) administer the provisions of this section by requiring pharmacies that participate in a 340B program
25 to submit any information deemed necessary by the department for the purpose of making a determination of
26 continued eligibility for tax-exempt status;
27 (b) determine the average cost of purchasing all prescription drugs outside of the 340B program; and
28 (c) adopt rules to administer the provisions of this section.
29 (4) The department may require pharmacies that do not participate in the 340B program to submit
30 prescription drug costs to the department for the purpose of administering subsections (2)(b)(iv) and (2)(b)(v).

1 (5) This section does not apply to Medicaid patients. For the purpose of this section, Medicaid patient
2 pharmacy sales are treated in the same manner as sales to the uninsured.

3
4 **NEW SECTION. Section 2. Fine in lieu of tax for engaging in commercial pharmacy enterprise.**

5 (1) The department shall assess a fine against a nonprofit corporation or an institution of purely public charity that
6 fails to comply with the provisions of [section 1] by engaging in a commercial pharmacy enterprise. The fine is
7 imposed at the rate specified in 15-31-121(2) upon its net pharmacy revenue derived from sources within this
8 state, and the net revenue is treated in the same manner as income under the provisions of Title 15, chapter 31,
9 as modified by subsections (1)(a) through (1)(c). For the purpose of this subsection, net revenue:

10 (a) consists of revenue from the commercial pharmacy enterprise;

11 (b) is calculated based on the nonprofit corporation or institution's fiscal year; and

12 (c) does not include donations.

13 (2) An entity subject to a fine in lieu of tax under this section shall file a copy of its federal exempt
14 organization business income tax return with the department.

15 (3) All remedies available to the state for the administration, enforcement, and collection of taxes imposed
16 under this chapter are available and apply to the fines provided for in this section.

17
18 **Section 3.** Section 15-6-201, MCA, is amended to read:

19 **"15-6-201. Governmental, charitable, and educational categories -- exempt property.** (1) The
20 following categories of property are exempt from taxation:

21 (a) except as provided in 15-24-1203, the property of:

22 (i) the United States, except:

23 (A) if congress passes legislation that allows the state to tax property owned by the federal government
24 or an agency created by congress; or

25 (B) as provided in 15-24-1103;

26 (ii) the state, counties, cities, towns, and school districts;

27 (iii) irrigation districts organized under the laws of Montana and not operated for gain or profit;

28 (iv) municipal corporations;

29 (v) public libraries;

30 (vi) rural fire districts and other entities providing fire protection under Title 7, chapter 33;

1 (vii) special districts created pursuant to Title 7, chapter 11, part 10; and
2 (viii) subject to subsection (2), federally recognized Indian tribes in the state if the property is located
3 entirely within the exterior boundaries of the reservation of the tribe that owns the property and the property is
4 used exclusively by the tribe for essential government services. Essential government services are tribal
5 government administration, fire, police, public health, education, recreation, sewer, water, pollution control, public
6 transit, and public parks and recreational facilities.

7 (b) buildings and furnishings in the buildings that are owned by a church and used for actual religious
8 worship or for residences of the clergy, not to exceed one residence for each member of the clergy, together with
9 the land that the buildings occupy and adjacent land reasonably necessary for convenient use of the buildings,
10 which must be identified in the application, and all land and improvements used for educational or youth
11 recreational activities if the facilities are generally available for use by the general public but may not exceed 15
12 acres for a church or 1 acre for a clergy residence after subtracting any area required by zoning, building codes,
13 or subdivision requirements;

14 (c) land and improvements upon the land, not to exceed 15 acres, owned by a federally recognized
15 Indian tribe when the land has been set aside by tribal resolution and designated as sacred land to be used
16 exclusively for religious purposes;

17 (d) property owned and used exclusively for agricultural and horticultural societies not operated for gain
18 or profit;

19 (e) property, not to exceed 80 acres, which must be legally described in the application for the
20 exemption, used exclusively for educational purposes, including dormitories and food service buildings for the
21 use of students in attendance and other structures necessary for the operation and maintenance of an
22 educational institution that:

23 (i) is not operated for gain or profit;

24 (ii) has an attendance policy; and

25 (iii) has a definable curriculum with systematic instruction;

26 (f) property, of any acreage, owned by a tribal corporation created for the sole purpose of establishing
27 schools, colleges, and universities if the property meets the requirements of subsection (1)(e);

28 (g) property used exclusively for nonprofit health care facilities, as defined in 50-5-101, licensed by the
29 department of public health and human services and organized under Title 35, chapter 2 or 3, subject to the
30 provisions of [sections 1 and 2] pertaining to operation of a commercial pharmacy enterprise. A health care facility

1 that is not licensed by the department of public health and human services and organized under Title 35, chapter
2 2 or 3, is not exempt.

3 (h) property that is:

4 (i) (A) owned and held by an association or corporation organized under Title 35, chapter 2, subject to
5 the provisions of [sections 1 and 2] pertaining to operation of a commercial pharmacy enterprise, chapter 3, 20,
6 or 21; or

7 (B) owned by a federally recognized Indian tribe within the state and set aside by tribal resolution; and

8 (ii) devoted exclusively to use in connection with a cemetery or cemeteries for which a permanent care
9 and improvement fund has been established as provided for in Title 35, chapter 20, part 3; and

10 (iii) not maintained and not operated for gain or profit;

11 (i) (i) subject to subsection (2), property that is owned or property that is leased from a federal, state, or
12 local governmental entity by institutions of purely public charity if the property is directly used for purely public
13 charitable purposes;_

14 (ii) Property that is used for a commercial pharmacy enterprise as defined in [section 1] is not property
15 used for a purely public charitable purpose.

16 (j) evidence of debt secured by mortgages of record upon real or personal property in the state of
17 Montana;

18 (k) public museums, art galleries, zoos, and observatories that are not operated for gain or profit;

19 (l) motor vehicles, land, fixtures, buildings, and improvements owned by a cooperative association or
20 nonprofit corporation organized to furnish potable water to its members or customers for uses other than the
21 irrigation of agricultural land;

22 (m) the right of entry that is a property right reserved in land or received by mesne conveyance (exclusive
23 of leasehold interests), devise, or succession to enter land with a surface title that is held by another to explore,
24 prospect, or dig for oil, gas, coal, or minerals;

25 (n) (i) property that is owned and used by a corporation or association organized and operated
26 exclusively for the care of persons with developmental disabilities, persons with mental illness, or persons with
27 physical or mental impairments that constitute or result in substantial impediments to employment and that is not
28 operated for gain or profit; and

29 (ii) property that is owned and used by an organization owning and operating facilities that are for the care
30 of the retired, aged, or chronically ill and that are not operated for gain or profit; and

1 (o) property owned by a nonprofit corporation that is organized to provide facilities primarily for training
2 and practice for or competition in international sports and athletic events and that is not held or used for private
3 or corporate gain or profit. For purposes of this subsection (1)(o), "nonprofit corporation" means an organization
4 that is exempt from taxation under section 501(c) of the Internal Revenue Code and incorporated and admitted
5 under the Montana Nonprofit Corporation Act.

6 (2) (a) (i) For the purposes of tribal property under subsection (1)(a)(viii), the property subject to
7 exemption may not be:

8 (A) operated for gain or profit;

9 (B) held under contract to operate, lease, or sell by a taxable individual;

10 (C) used or possessed exclusively by a taxable individual or entity; or

11 (D) held by a tribal corporation except for educational purposes as provided in subsection (1)(f).

12 (ii) For the purposes of parks and recreational facilities under subsection (1)(a)(viii), the property must
13 be:

14 (A) set aside by tribal resolution and designated as park land, not to exceed 640 acres, or be designated
15 as a recreational facility; and

16 (B) open to the general public.

17 (b) For the purposes of subsection (1)(b), the term "clergy" means, as recognized under the federal
18 Internal Revenue Code:

19 (i) an ordained minister, priest, or rabbi;

20 (ii) a commissioned or licensed minister of a church or church denomination that ordains ministers if the
21 person has the authority to perform substantially all the religious duties of the church or denomination;

22 (iii) a member of a religious order who has taken a vow of poverty; or

23 (iv) a Christian Science practitioner.

24 (c) For the purposes of subsection (1)(i):

25 (i) the term "institutions of purely public charity" includes any organization that meets the following
26 requirements:

27 (A) The organization offers its charitable goods or services to persons without regard to race, religion,
28 creed, or gender and qualifies as a tax-exempt organization under the provisions of section 501(c)(3), Internal
29 Revenue Code, as amended.

30 (B) The organization accomplishes its activities through absolute gratuity or grants. However, the

1 organization may solicit or raise funds by the sale of merchandise, memberships, or tickets to public
2 performances or entertainment or by other similar types of fundraising activities.

3 (ii) agricultural property owned by a purely public charity is not exempt if the agricultural property is used
4 by the charity to produce unrelated business taxable income as that term is defined in section 512 of the Internal
5 Revenue Code, 26 U.S.C. 512. A public charity claiming an exemption for agricultural property shall file annually
6 with the department a copy of its federal tax return reporting any unrelated business taxable income received by
7 the charity during the tax year, together with a statement indicating whether the exempt property was used to
8 generate any unrelated business taxable income.

9 (iii) up to 15 acres of property owned by a purely public charity is exempt at the time of its purchase even
10 if the property must be improved before it can directly be used for its intended charitable purpose. If the property
11 is not directly used for the charitable purpose within 8 years of receiving an exemption under this section or if the
12 property is sold or transferred before it entered direct charitable use, the exemption is revoked and the property
13 is taxable. In addition to taxes due for the first year that the property becomes taxable, the owner of the property
14 shall pay an amount equal to the amount of the tax due that year times the number of years that the property was
15 tax-exempt under this section. The amount due is a lien upon the property and when collected must be distributed
16 by the treasurer to funds and accounts in the same ratio as property tax collected on the property is distributed.
17 At the time the exemption is granted, the department shall file a notice with the clerk and recorder in the county
18 in which the property is located. The notice must indicate that an exemption pursuant to this section has been
19 granted. The notice must describe the penalty for default under this section and must specify that a default under
20 this section will create a lien on the property by operation of law. The notice must be on a form prescribed by the
21 department.

22 (iv) not more than 160 acres may be exempted by a purely public charity under any exemption originally
23 applied for after December 31, 2004. An application for exemption under this section must contain a legal
24 description of the property for which the exemption is requested.

25 (d) For the purposes of subsection (1)(k), the term "public museums, art galleries, zoos, and
26 observatories" means governmental entities or nonprofit organizations whose principal purpose is to hold property
27 for public display or for use as a museum, art gallery, zoo, or observatory. The exempt property includes all real
28 and personal property owned by the public museum, art gallery, zoo, or observatory that is reasonably necessary
29 for use in connection with the public display or observatory use. Unless the property is leased for a profit to a
30 governmental entity or nonprofit organization by an individual or for-profit organization, real and personal property

1 owned by other persons is exempt if it is:

2 (i) actually used by the governmental entity or nonprofit organization as a part of its public display;

3 (ii) held for future display; or

4 (iii) used to house or store a public display."

5

6 **Section 4.** Section 15-31-102, MCA, is amended to read:

7 **"15-31-102. Organizations exempt from tax -- unrelated business income not exempt.** (1) Except

8 as provided in subsection (3), there may not be taxed under this title any income received by any:

9 (a) labor, agricultural, or horticultural organization;

10 (b) fraternal beneficiary, society, order, or association operating under the lodge system or for the
11 exclusive benefit of the members of a fraternity itself operating under the lodge system and providing for the
12 payment of life, sick, accident, or other benefits to the members of the society, order, or association or their
13 dependents;

14 (c) cemetery company owned and operated exclusively for the benefit of its members;

15 (d) except as provided in [sections 1 and 2] pertaining to engaging in a commercial pharmacy enterprise,
16 corporation or association organized and operated exclusively for religious, charitable, scientific, or educational
17 purposes, no part of the net income of which inures to the benefit of any private stockholder or individual;

18 (e) business league, chamber of commerce, or board of trade not organized for profit, no part of the net
19 income of which inures to the benefit of any private stockholder or individual;

20 (f) civic league or organization not organized for profit but operated exclusively for the promotion of social
21 welfare;

22 (g) club organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes,
23 no part of the net income of which inures to the benefit of any private stockholder or members;

24 (h) farmers' or other mutual hail, cyclone, or fire insurance company, mutual ditch or irrigation company,
25 mutual or cooperative telephone company, or similar organization of a purely local character, the income of which
26 consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting its
27 expenses;

28 (i) cooperative association or corporation engaged in the business of operating a rural electrification
29 system or systems for the transmission or distribution of electrical energy on a cooperative basis;

30 (j) corporations or associations organized for the exclusive purpose of holding title to property, collecting

1 income from the property, and turning over the entire amount of the income, less expenses, to an organization
2 that itself is exempt from the tax imposed by this title;

3 (k) wool and sheep pool, which is an association owned and operated by agricultural producers
4 organized to market association members' wool and sheep, the income of which consists solely of assessments,
5 dues, and fees collected from members for the sole purpose of meeting its expenses. Income, for this purpose,
6 does not include expenses and money distributed to members contributing wool and sheep.

7 (l) corporation that qualifies as a domestic international sales corporation (DISC) under the provisions
8 of section 991, et seq., of the Internal Revenue Code, 26 U.S.C. 991, et seq., and that has in effect for the entire
9 taxable year a valid election under federal law to be treated as a DISC. If a corporation makes that election under
10 federal law, each person who at any time is a shareholder of the corporation is subject to taxation under Title 15,
11 chapter 30, on the earnings and profits of this DISC in the same manner as provided by federal law for all periods
12 for which the election is effective.

13 (m) farmers' market association not organized for profit, no part of the net income of which inures to the
14 benefit of any member, but that is organized for the sole purpose of providing for retail distribution of homegrown
15 vegetables, handicrafts, and other products either grown or manufactured by the seller;

16 (n) common trust fund as defined in section 584(a) of the Internal Revenue Code, 26 U.S.C. 584(a).

17 (2) In determining the corporate income tax imposed under this part, there may not be included any
18 earnings derived from any public utility managed or operated by any subdivision of the state or from the exercise
19 of any governmental function.

20 (3) Any unrelated business taxable income, as defined by section 512 of the Internal Revenue Code,
21 26 U.S.C. 512, as amended, earned by any exempt corporation resulting in a federal unrelated business income
22 tax liability of more than \$100 must be taxed as other corporation income is taxed under this title. An exempt
23 corporation subject to taxation on unrelated business income under this section shall file a copy of its federal
24 exempt organization business income tax return on which it reports its unrelated business income with the
25 department."

26

27 **Section 5.** Section 35-2-118, MCA, is amended to read:

28 **"35-2-118. General powers.** (1) Unless its articles of incorporation provide otherwise, a corporation has
29 perpetual duration and succession in its corporate name and has the same powers as an individual to do all
30 things necessary or convenient to carry out its affairs including, without limitation, power:

- 1 (a) to sue and be sued, complain, and defend in its corporate name;
- 2 (b) to have a corporate seal, which may be altered at will, and to use it or a facsimile of the seal by
3 impressing, affixing, or in any other manner reproducing it;
- 4 (c) to make and amend bylaws, consistent with its articles of incorporation or with the laws of this state,
5 for regulating and managing the affairs of the corporation;
- 6 (d) to purchase, receive, lease, or otherwise acquire and to own, hold, improve, use, and otherwise deal
7 with real or personal property or any legal or equitable interest in property, wherever located;
- 8 (e) to sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its
9 property;
- 10 (f) to purchase, receive, subscribe for, or otherwise acquire any other entity; to own, hold, vote, use, sell,
11 mortgage, lend, pledge, or otherwise dispose of any other entity; and to deal in and with shares or other interests
12 in or obligations of any other entity;
- 13 (g) to make contracts and guaranties; to incur liabilities; to borrow money; to issue notes, bonds, and
14 other obligations; and to secure any of its obligations by mortgage or pledge of any of its property, franchises,
15 or income;
- 16 (h) to lend money, invest and reinvest its funds, and receive and hold real and personal property as
17 security for repayment, except as limited by 35-2-435;
- 18 (i) to be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or
19 other entity;
- 20 (j) to conduct its activities, locate offices, and exercise the powers granted by this chapter in the state
21 or out of the state;
- 22 (k) to elect or appoint directors, officers, employees, and agents of the corporation; to define their duties;
23 and to fix their compensation;
- 24 (l) to pay pensions and establish pension plans, pension trusts, and other benefit and incentive plans
25 for any or all of its current or former directors, officers, employees, and agents;
- 26 (m) to make donations consistent with law for the public welfare or for charitable, religious, scientific, or
27 educational purposes and for other purposes that further the corporate interest;
- 28 (n) to impose dues, assessments, admission, and transfer fees upon its members;
- 29 (o) to establish conditions for admission of members, admit members, and issue memberships;
- 30 (p) to carry on a business, except as provided in [sections 1 and 2] regarding a commercial pharmacy

1 enterprise;

2 (q) to serve as trustee of any trust in which it is expressly designated under the terms of the trust as
3 having a present or future beneficial interest, vested or contingent; or

4 (r) to do all things necessary or convenient consistent with law to further the activities and affairs of the
5 corporation.

6 (2) A corporation may not have or issue shares of stock."
7

8 NEW SECTION. Section 6. Codification instruction. (1) [Section 1] is intended to be codified as an
9 integral part of Title 15, chapter 6, part 2, and the provisions of Title 15, chapter 6, part 2, apply to [section 1].

10 (2) [Section 2] is intended to be codified as an integral part of Title 15, chapter 31, part 1, and the
11 provisions of Title 15, chapter 31, part 1, apply to [section 2].
12

13 NEW SECTION. Section 7. Applicability. [This act] applies to tax years beginning after December 31,
14 2015.
15

- END -