

SENATE BILL NO. 317  
INTRODUCED BY LIND, FACEY

A BILL FOR AN ACT ENTITLED: "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, AND 35-2-722, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

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

NEW SECTION. Section 1. Definitions. As used in [sections 1 through 18], the following definitions apply:

(1) "Commissioner" means the Montana state auditor and ex officio commissioner of insurance provided for in 2-15-1903.

(2) "CONTROL OR GOVERNANCE" MEANS THE POSSESSION, INDIRECT OR DIRECT, 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 A CORPORATE OFFICE HELD BY THE PERSON.

~~(2)(3)~~ (a) "Conversion" or "conversion transaction" means the sale, transfer, lease, exchange, transfer by exercise of an option, optioning, conveyance, ~~conversion~~, merger, affiliation, mutualization, joint venture, or other disposition BY A NONPROFIT HEALTH ENTITY OR ANOTHER PERSON OR ENTITY resulting in the transfer of control or governance TO A PERSON OR ENTITY OTHER THAN THE NONPROFIT HEALTH ENTITY of the lesser of:

- (i) more than 10% in ~~full~~ fair market value of the assets or operations of a nonprofit health entity; or
- (ii) assets of a nonprofit health entity amounting to a ~~full~~ fair market value of \$5 million or more.

(b) A disposition or transfer constitutes a conversion transaction regardless of whether it occurs directly or indirectly and whether it occurs in a single transaction or a series of related transactions. ~~A change in the~~

~~service area of the nonprofit health entity is considered a substantial change in the mission. IN DETERMINING THE VALUE OF A TANGIBLE ASSET UNDER THIS DEFINITION, THE VALUE OF THE ASSET MUST BE CALCULATED NET OF ANY MORTGAGE, LIEN, OR OTHER ENCUMBRANCE ON THE ASSET THAT EXISTS OF RECORD.~~

(c) The term does not include:

~~(i) a transaction in the ordinary course of the nonprofit health entity's business that does not result in a MATERIAL change in the nonprofit health entity's ownership, management structure, or nonprofit corporate mission; including but not limited to:~~

~~(ii) A TRANSACTION OR SERIES OF TRANSACTIONS IN THE ORDINARY COURSE OF A NONPROFIT HEALTH ENTITY'S BUSINESS IF THE EFFECT OF THE TRANSACTION OR SERIES OF TRANSACTIONS IS NOT TO CONVERT THE NONPROFIT HEALTH ENTITY FROM A NONPROFIT TO A FOR-PROFIT ENTITY, TO TRANSFER THE NONPROFIT HEALTH ENTITY'S BUSINESS OR OPERATIONS TO A FOR-PROFIT ENTITY, OR TO TRANSFER THE CONTROL OR BENEFIT OF PUBLIC ASSETS AND THE PROCEEDS OF PUBLIC ASSETS TO A MUTUAL BENEFIT OR FOR-PROFIT ENTITY;~~

~~(iii) AWARDS, GRANTS, OR PAYMENTS TO OR ON BEHALF OF INTENDED MEMBERS OR BENEFICIARIES, CONSISTENT WITH THE LAWFUL PURPOSES OF A NONPROFIT HEALTH ENTITY;~~

~~(iv) 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 IF 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 TRANSFER OF A POWER OF APPOINTMENT OF DIRECTORS OR OFFICERS OF THE NONPROFIT HEALTH ENTITY OR A WHOLLY OWNED SUBSIDIARY OF THE NONPROFIT HEALTH ENTITY;~~

~~(v) SETTLEMENT, SATISFACTION, OR PAYMENT OF A CLAIM OR SUIT AGAINST OR DEBT OF THE NONPROFIT HEALTH ENTITY OR A WHOLLY OWNED SUBSIDIARY OF THE NONPROFIT HEALTH ENTITY INCURRED IN THE ORDINARY COURSE OF BUSINESS;~~

~~(vi) 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;~~

~~(vii) 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 A NONPROFIT HEALTH ENTITY OR A TRANSACTION ORDERED BY THE COMMISSIONER OR THE ATTORNEY GENERAL;~~

~~(viii) 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 ~~NEGOTIABLE INSTRUMENTS AS DEFINED IN 30-3-104~~ BUT NOT LIMITED TO STOCKS, SHARES, BONDS, NOTES, EVIDENCES OF INDEBTEDNESS, NEGOTIABLE INSTRUMENTS, OR AN OWNERSHIP INTEREST IN AN ENTITY, TO BE HELD BY THE NONPROFIT HEALTH ENTITY OR ITS WHOLLY OWNED SUBSIDIARY;

~~(ii)~~(ix) granting of an encumbrance in the ordinary course of business, such as a security interest or mortgage deed with respect to an asset owned by the nonprofit health entity or a wholly owned subsidiary of the nonprofit health entity to secure indebtedness for borrowed money, the net proceeds of which are paid solely to the nonprofit health entity or its wholly owned subsidiary, and a foreclosure or other exercise of remedies permitted with respect to an encumbrance; ~~or~~

~~(ii)~~(x) sale, investment, or transfer in the ordinary course of business for ~~full~~ fair market value of an interest in property owned by the nonprofit health entity or a wholly owned subsidiary, the net proceeds of which are paid solely to the nonprofit health entity or its wholly owned subsidiary; ~~OR~~

(xi) ANY TRANSFER OF ASSETS BETWEEN A NONPROFIT HEALTH ENTITY THAT IS A NONPROFIT PUBLIC BENEFIT CORPORATION AND A NONPROFIT MUTUAL BENEFIT CORPORATION IN WHICH ALL OF THE MEMBERS ARE NONPROFIT PUBLIC BENEFIT CORPORATIONS, PROVIDED THAT THE MANAGEMENT OF ALL ASSETS TRANSFERRED BY A NONPROFIT PUBLIC BENEFIT CORPORATION IN A TRANSACTION DESCRIBED IN THIS SUBSECTION (3)(C)(xi) CONTINUE TO BE MANAGED IN A MANNER CONSISTENT WITH THE PUBLIC BENEFIT PURPOSE OF THE TRANSFERRING NONPROFIT PUBLIC BENEFIT CORPORATION; OR

~~(xi)~~(xii) ANY OTHER TRANSACTION OR PROPOSED TRANSACTION FOR FAIR MARKET VALUE IF:

(A) 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;

(B) THE NONPROFIT HEALTH ENTITY MAINTAINS ITS OPERATIONS AS A NONPROFIT HEALTH ENTITY AND PUBLIC ASSETS OR THE PROCEEDS OF PUBLIC ASSETS ARE MAINTAINED AS PUBLIC ASSETS; AND

(C) 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.

~~(3)(4) "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.

(4) "FAIR MARKET VALUE" MEANS THE 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.

~~(4)~~(5) "Health maintenance organization" has the meaning provided in 33-31-102.

(6) "HEALTH SERVICE CORPORATION" HAS THE MEANING PROVIDED IN 33-30-101.

~~(5)~~~~(6)~~(7) (a) "Nonprofit health entity" means:

(i) a nonprofit health maintenance organization; or

(ii) a nonprofit health service corporation, ~~as defined in 33-30-101.~~

(b) The term includes any entities affiliated with a nonprofit health entity through ownership, governance, or membership, such as a holding company or subsidiary.

(8) "ORDINARY COURSE OF BUSINESS" MEANS WITH RESPECT TO A TRANSACTION OR DISPOSITION THAT THE TRANSACTION COMPORTS WITH THE USUAL AND CUSTOMARY PRACTICES ~~ON~~ OF THE KIND OF BUSINESS IN WHICH THE NONPROFIT HEALTH ENTITY IS ENGAGED.

~~(6)~~~~(7)~~(9) "Public assets" include:

(a) assets held for the benefit of the public or the community;

(b) assets in which the public has an ownership interest;

(c) assets owned by a governmental entity; and

(d) assets owned by a nonprofit corporation to the extent that the corporation holds assets in a charitable trust.

~~(7)~~~~(8)~~(10) "Transferee" means the person in a conversion transaction that receives the ownership or control of the nonprofit health entity that is the subject of the conversion transaction or of the nonprofit health entity's assets.

~~(8)~~~~(9)~~(11) "Transferor" means the nonprofit health entity that is the subject of the conversion transaction or the corporation that owns the nonprofit health entity that is the subject of the conversion transaction.

NEW SECTION. Section 2. Conversion transaction -- approval. A person may not engage in a conversion transaction involving a nonprofit health entity unless the commissioner and the attorney general issue orders approving the conversion transaction.

NEW SECTION. Section 3. Rulemaking authority. The commissioner and the attorney general shall adopt rules to carry out [sections 1 through 18], including rules that:

- (1) specify the form and content of the written notice, required documents, and supplemental information;
- (2) develop procedures under which ~~information may be considered~~ proprietary business information ~~or AND~~ trade secrets ARE PROTECTED FROM PUBLIC DISCLOSURE for the purposes of [section 6] TO THE EXTENT ALLOWED BY LAW; and
- (3) establish hearing and appeal procedures.

NEW SECTION. Section 4. Rights and powers. (1) (A) [Sections 1 through 18] may not be construed to impair the rights and powers of a court or the attorney general with respect to THE ASSETS OF ANY PUBLIC BENEFIT CORPORATION, TO any asset devoted to charity, OR to a charitable trust as provided in Title 72, chapter 33, part 5, or to the dissolution of a public benefit corporation as provided in 35-2-722.

(B) FILING OF AN APPLICATION UNDER [SECTIONS 1 THROUGH 18] SATISFIES ANY NOTICE REQUIREMENTS UNDER 35-2-609, 35-2-617, OR 35-2-722.

(2) NOTHING IN [SECTIONS 1 THROUGH 18] PRECLUDES THE ATTORNEY GENERAL OR COMMISSIONER FROM SEEKING A DECLARATORY JUDGMENT ON WHETHER AN ACTION MAY BE CONSIDERED A CONVERSION TRANSACTION OR A TRANSACTION IN THE ORDINARY COURSE OF BUSINESS.

(2) (A) (i) NOTHING IN [SECTIONS 1 THROUGH 18] PRECLUDES THE ATTORNEY GENERAL, THE COMMISSIONER, OR A NONPROFIT HEALTH ENTITY FROM FILING AN ACTION IN DISTRICT COURT UNDER TITLE 27, CHAPTER 8, SEEKING A DECLARATION THAT A NONPROFIT HEALTH ENTITY TRANSACTION IS OR IS NOT A CONVERSION TRANSACTION AS DEFINED IN [SECTION 1] OR A DECLARATION OF WHETHER ASSETS OF A NONPROFIT HEALTH ENTITY ARE OR ARE NOT PUBLIC ASSETS AS DEFINED IN [SECTION 1]. NO OTHER DECLARATORY RELIEF MAY BE SOUGHT IN A COURT REGARDING ANY ISSUE ARISING FROM A TRANSACTION THAT IS OR IS ALLEGED TO BE A CONVERSION TRANSACTION UNDER [SECTIONS 1 THROUGH 18], EXCEPT THAT A TRANSFEROR OR TRANSFEREE MAY FILE AN ACTION IN DISTRICT COURT SEEKING AN INJUNCTION PROHIBITING THE ATTORNEY GENERAL OR COMMISSIONER FROM MAKING AN UNLAWFUL DISCLOSURE OF TRADE SECRETS OR PROPRIETARY OR OTHER CONFIDENTIAL INFORMATION.

(ii) IN AN ACTION UNDER THIS SUBSECTION (2) TO DETERMINE WHETHER ASSETS OF A NONPROFIT HEALTH ENTITY ARE OR ARE NOT PUBLIC ASSETS, THE PRESUMPTION IN [SECTION 13(3)] APPLIES.

(B) THE COMMISSIONER OR THE ATTORNEY GENERAL, OR BOTH, MAY CONTRACT WITH EXPERTS AS REASONABLY NECESSARY TO BRING OR DEFEND AN ACTION PURSUANT TO THIS SUBSECTION (2) AND THE NONPROFIT HEALTH ENTITY SHALL PAY THE COSTS REASONABLY INCURRED BY THE COMMISSIONER OR THE ATTORNEY GENERAL FOR THE EXPERTS'

SERVICES.

(C) IN AN ACTION UNDER THIS SUBSECTION (2), IF THE COURT FINDS THAT THE TRANSACTION IS A CONVERSION TRANSACTION SUBJECT TO [SECTIONS 1 THROUGH 18] AND THE TRANSACTION HAS NOT BEEN COMPLETED, THE COURT SHALL ENTER AN INJUNCTION PROHIBITING ANY FURTHER ACTIONS TO COMPLETE THE TRANSACTION UNTIL IT HAS BEEN APPROVED BY THE COMMISSIONER AND ATTORNEY GENERAL UNDER [SECTION 2].

(D) IN AN ACTION UNDER THIS SUBSECTION (2), IF THE COURT FINDS THAT A COMPLETED TRANSACTION WAS A CONVERSION TRANSACTION THAT THE COMMISSIONER AND ATTORNEY GENERAL HAVE NOT APPROVED UNDER [SECTION 2], THE COURT SHALL ENTER AN INJUNCTION REQUIRING THE NONPROFIT HEALTH ENTITY OR ANY SUCCESSOR TO THE ASSETS INVOLVED IN THE TRANSACTION TO SUBMIT AN APPLICATION FOR REVIEW UNDER [SECTION 5]. AFTER REVIEWING ANY APPLICATION SUBMITTED FOLLOWING A COURT ORDER UNDER THIS SUBSECTION (2)(D), THE ATTORNEY GENERAL MAY DIRECT THAT THE NONPROFIT HEALTH ENTITY OR ANY SUCCESSOR TO THE ASSETS INVOLVED IN THE TRANSACTION DISTRIBUTE THE FAIR MARKET VALUE OF ANY PUBLIC ASSETS INVOLVED IN THE TRANSACTION AS REQUIRED UNDER [SECTION 18].

(E) THE COURT ISSUING THE DECLARATORY JUDGMENT RETAINS JURISDICTION TO ENFORCE ANY DIRECTION BY THE ATTORNEY GENERAL FOR DISTRIBUTION OF THE FAIR MARKET VALUE OF PUBLIC ASSETS UNDER THIS SUBSECTION (2).

(3) [SECTIONS 1 THROUGH 18] MAY NOT BE CONSTRUED TO MAKE VOID OR VOIDABLE OR TO REQUIRE ANY DISTRIBUTION OF ASSETS WITH RESPECT TO ANY TRANSACTION OR SERIES OF TRANSACTIONS COMPLETED BEFORE [THE EFFECTIVE DATE OF THIS ACT], EVEN IF THAT TRANSACTION OR SERIES OF TRANSACTIONS IS CONSIDERED AS PART OF A CONVERSION TRANSACTION COMPLETED ON OR AFTER [THE EFFECTIVE DATE OF THIS ACT].

**NEW SECTION. Section 5. Application process -- content.** (1) A person that seeks to engage in a conversion transaction for a nonprofit health entity and the nonprofit health entity shall submit an application to the commissioner and a copy of the application to the attorney general.

(2) The application submitted under subsection (1) is in addition to any other filing required by law.

(3) An application must include:

(a) the name of the proposed transferor;

(b) the name of the proposed transferee;

(c) the names of any other parties to the conversion transaction agreement;

(d) the terms of the proposed conversion transaction, including but not limited to a description and valuation of all consideration exchanges as a part of or as a result of the conversion AND THE EXTENT TO WHICH THE ASSETS PROPOSED TO BE CONVERTED ARE PUBLIC ASSETS;

- (e) a copy of the conversion transaction agreement;
- (f) a financial and community impact analysis report from an independent expert or consultant that addresses the criteria in [sections 13 through 15];
- (g) an independent valuation of the ~~full~~ fair market value of the nonprofit health entity for a valuation date within 1 year prior to receipt by the nonprofit health entity or publication of a bona fide bid, offer, or letter of intent to acquire the nonprofit health entity; AND
- (h) an antitrust analysis prepared by an appropriate expert; ~~and~~
- ~~—— (i) any other documents related to the conversion transaction.~~

**NEW SECTION. Section 6. Public records.** All documents and records, excluding any proprietary or confidential information as defined by ~~rule~~ LAW, submitted to the commissioner or attorney general by any person, including a nonprofit health entity making application under [section 5], in connection with the commissioner's and the attorney general's review of the proposed nonprofit health entity conversion transaction are public records to the extent required by the provisions of applicable state law. The contents of the application submitted to the commissioner pursuant to [section 5] are a public record, EXCEPT THAT ANY PROPRIETARY INFORMATION OR TRADE SECRET THAT MAY BY LAW BE KEPT CONFIDENTIAL IS NOT A PUBLIC RECORD.

**NEW SECTION. Section 7. Receiving an application -- notice of application.** (1) Within 15 working days after receiving an application for a conversion transaction, the commissioner shall:

- (a) publish notice of the application by the internet and by press release to the most widely circulated newspapers in a nonprofit health entity's service area; and
  - (b) maintain a list of, and notify by e-mail or first-class mail, any person that has requested in writing notice of the filing of an application.
- (2) The notice under subsection (1) must:
- (a) state that an application has been received;
  - (b) state the names of the parties to the conversion transaction;
  - (c) describe the contents of the application;
  - (d) state the date by which a person shall submit written comments on the application; and
  - (e) provide the date, time, and place of the public hearing on the conversion transaction.

**NEW SECTION. Section 8. Public hearing.** (1) As soon as practicable, but no later than 90 days after

receiving a complete application for a conversion transaction, including all necessary expert reports, the commissioner or a designee shall hold a public hearing.

(2) Any person may file written comments and exhibits or make a statement at the public hearing.

**NEW SECTION. Section 9. Procedures.** (1) In the hearing required by [section 8], the commissioner and the attorney general shall agree on and jointly appoint a qualified person to preside over the hearing. The commissioner, the attorney general, the transferor, and the transferee may use discovery procedures as provided in Title 25, chapter 20. Except as otherwise specifically provided in this section, the procedures for conducting a contested case hearing, as provided in 2-4-611(3) and (4), 2-4-612; THROUGH 2-4-614, and 2-4-621 through 2-4-623, and the procedures for judicial review of contested case decisions under Title 2, chapter 4, part 7, apply.

(2) Notwithstanding any otherwise applicable rule of evidence, the commissioner and attorney general shall provide for the receipt of comments from the public in writing or on the record at the hearing. Oral public comments are not subject to cross-examination without the consent of the person providing the comments. However, the commissioner and the attorney general may rely on factual information provided in public comment only if the person providing the comment consents to cross-examination 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.

**NEW SECTION. Section 10. Experts.** (1) The commissioner or the attorney general, or both, may contract with experts as reasonably necessary to:

- (a) determine whether to approve a conversion transaction generally;
- (b) perform an independent valuation of ~~the~~ fair market value of the public assets of the transferor;
- (c) evaluate the impact of the conversion on the affected community;
- (d) determine whether there has been due diligence by the transferor in evaluating the proposed conversion transaction; and
- (e) determine the existence of any conflicts of interest.

(2) If the commissioner or attorney general contracts for expert assistance under subsection (1), the transferor and the transferee shall each pay half of the costs reasonably incurred by the commissioner or the attorney general for the expert's services.

**NEW SECTION. Section 11. Deadline for approval or nonapproval.** (1) Within 60 days after the



record, including the public hearing process, has been closed, the commissioner and the attorney general shall each issue a separate order to:

- (a) approve the conversion transaction, with or without modifications; or
- (b) disapprove the conversion transaction.

(2) If the commissioner and the attorney general do not both determine that the conversion transaction is approved, the conversion transaction is disapproved.

(3) Subject to subsection (4), the commissioner or the attorney general may, for cause, extend the time for making a determination for a 60-day period.

(4) The commissioner and the attorney general are limited to a maximum of two 60-day extensions for making a determination on the same application.

NEW SECTION. Section 12. Effect of determination. Determinations made by the commissioner and the attorney general under [section 11] become effective ~~90 calendar days after~~ ON the date on which ~~the determination is made or when ratified or rejected by the legislature, whichever is earlier~~ BOTH THE COMMISSIONER AND THE ATTORNEY GENERAL HAVE ISSUED ORDERS UNDER [SECTION 11].

NEW SECTION. Section 13. Criteria for attorney general approval of conversion transaction. (1) The attorney general may not approve a conversion transaction except upon a finding that the conversion transaction is in the public interest. IF THE ATTORNEY GENERAL OR A COURT PURSUANT TO [SECTION 4] DETERMINES THAT THE TRANSACTION DOES NOT INVOLVE PUBLIC ASSETS, THE ATTORNEY GENERAL MAY NOT DISAPPROVE THE CONVERSION TRANSACTION UNDER THE PROVISIONS OF [SECTIONS 1 THROUGH 18].

(2) In determining whether a conversion transaction is in the public interest, the attorney general shall require that:

- (a) the ~~full~~ fair market value of public assets is preserved and protected;
- (b) the ~~full~~ fair market value of public assets is expended or invested with reasonable and prudent consideration of the potential risk of financial loss associated with the conversion transaction;
- (c) the ~~full~~ fair market value of the public assets of a nonprofit health entity will be distributed as provided in [section 18];
- (d) no part of the public assets of the transferor inure directly or indirectly to an officer, director, or trustee of the transferor or to the transferee or an officer, director, trustee, shareholder, or employee of the transferee or to any other person that is not a foundation or nonprofit organization approved to receive the assets by the

attorney general; and

(e) an officer, director, or trustee of the nonprofit health entity does not receive any immediate or future remuneration as a result of a proposed conversion transaction except for the fair REASONABLE value of services rendered pursuant to a valid contract between the officer, director, or trustee and the nonprofit health entity.

(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.

NEW SECTION. Section 14. Criteria for distribution of assets. (1) The public assets distributed to a foundation or nonprofit organization in accordance with [section 13 or 18] must be in the form of cash or a combination of cash and publicly traded securities or bonds or similar assets that are readily convertible to cash and for which a secondary market exists.

(2) The attorney general may determine that a distribution of assets of a nonprofit health entity is not required if the transaction is determined not to be a conversion transaction and is a transaction in the ordinary course of business and for ~~full~~ fair market value.

(3) In determining ~~full~~ fair market value, the attorney general may consider all relevant factors, ~~including, as determined by the attorney general~~ THAT MAY INCLUDE BUT ARE NOT LIMITED TO:

(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.

NEW SECTION. Section 15. Criteria for commissioner approval of conversion transaction. (1) The commissioner may not approve a conversion transaction except upon a finding that the conversion transaction is in the public interest. IF THE ATTORNEY GENERAL OR A COURT PURSUANT TO [SECTION 4] DETERMINES THAT THE TRANSACTION DOES NOT INVOLVE PUBLIC ASSETS, THE COMMISSIONER MAY NOT DISAPPROVE THE CONVERSION TRANSACTION UNDER THE PROVISIONS OF [SECTIONS 1 THROUGH 18].

(2) In determining whether a conversion transaction is in the public interest, the commissioner shall

consider:

(a) whether the transferor exercised due diligence in deciding to engage in a conversion transaction, selecting the transferee, and negotiating the terms and conditions of the conversion transaction;

(b) the procedures that the transferor used in making the decision, including whether appropriate expert assistance was used;

(c) whether any conflicts of interest were disclosed, including conflicts of interest of board members, executives, and experts retained by the transferor, transferee, or any other parties to the conversion transaction;

(d) whether the conversion has the likelihood of creating a significant adverse effect on the availability or accessibility of health care services or health insurance coverage in the affected community;

(e) whether the conversion transaction includes sufficient safeguards to ensure that the affected community will have continued access to affordable health care;

(f) whether any management contract under the conversion transaction is for fair REASONABLE value; and

(g) whether the conversion transaction:

(i) is equitable to the public interest, enrollees, insureds, shareholders, and certificate holders, if any, of the transferor;

(ii) is in compliance with Title 33, chapters 30 and 31;

(iii) ensures that the transferee will possess surplus in an amount sufficient to comply with the surplus required under law and provide for the security of the transferee's certificate holders, if any, and policyholders.

(3) In making the determination required under this section, the commissioner may not determine that a conversion transaction is in the public interest unless the nonprofit health entity considered the risks of a conversion transaction, including whether a conversion transaction:

(a) would result in inefficient economies of scale; or

(b) would violate federal or state antitrust laws.

(4) If an agreement for the conversion of a nonprofit health entity requires payment of money, as liquidated damages or otherwise, in the event of a breach of the agreement by the nonprofit health entity, the commissioner shall determine whether and to what extent the payment by the nonprofit health entity is in the public interest.

NEW SECTION. **Section 16. Deposit of assets.** Any public assets distributed pursuant to [section 14] as a result of the conversion transaction of a nonprofit health entity approved by the commissioner and the attorney general on or after [the effective date of this act] must be distributed as provided in [section 18].

**NEW SECTION. Section 17. For-profit health entity.** (1) A corporation that becomes a for-profit health entity under [sections 1 through 18] may not be considered to have abandoned its corporate status by virtue of a conversion transaction unless the conversion transaction provides specifically to the contrary.

(2) The certificate of authority, agent appointments, licenses, forms, and any other filings in existence at the time of a conversion transaction continue in full force and effect upon a conversion transaction if a corporation at all times remains qualified to engage in business in the state.

(3) All outstanding contracts of a transferor remain in full force and effect and need not be otherwise endorsed unless ordered by the commissioner.

**NEW SECTION. Section 18. Distribution of proceeds -- annual report.** (1) ~~The~~ EXCEPT AS PROVIDED IN SUBSECTION (5), 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 the following requirements:

(a) The foundation or nonprofit organization shall operate pursuant to 26 U.S.C. 501(c)(3) or 501(c)(4), and regardless of whether the foundation is classified as a private foundation under 26 U.S.C. 509, the foundation or nonprofit organization shall operate in accordance with the restrictions and limitations that apply to private foundations in 26 U.S.C. 4941 through 4945.

(b) The foundation or nonprofit organization must have a mission statement that is as close as possible to the mission of the converting nonprofit health entity.

(c) The foundation or nonprofit organization's assets may not be used to supplant government funds.

(d) The foundation or nonprofit organization may not be an agent or instrumentality of the government.

(e) The foundation or nonprofit organization and its directors, officers, and staff must be and shall remain independent of the ~~for-profit company and its~~ PARTIES TO THE CONVERSION TRANSACTION AND THEIR affiliates. A person who is an officer, director, or staff member of a nonprofit health entity submitting a conversion plan at the time that the plan is submitted or at the time of the conversion transaction or within 5 years after the conversion may not be an officer, director, or staff member of the foundation. A director, officer, agent, or employee of the nonprofit health entity submitting the plan or the foundation receiving the charitable assets may not benefit directly or indirectly from the transaction. Public officials, elected or appointed, may not serve as an officer, director, or staff member of the foundation or nonprofit organization.

(f) A foundation or nonprofit organization must have or shall establish formal mechanisms to avoid conflicts of interest and to prohibit grants benefiting:

(i) ~~the for-profit entity~~ ANY PARTY TO THE CONVERSION TRANSACTION or members of the board of directors and management of ~~the for-profit entity~~ A PARTY TO THE CONVERSION TRANSACTION; or

(ii) the foundation or nonprofit organization's board of trustees, directors, agents, or employees.

(g) Boards of trustees or directors of the foundation or nonprofit organization shall reflect the geographic, ethnic, gender, age, socioeconomic, and other factors that the board considers to represent the diversity of the nonprofit health entity applicant's service area. In addition, trustees or directors must have the following qualifications and qualities:

(i) interest in and concern for the foundation or nonprofit organization and its mission;

(ii) objectivity and impartiality;

(iii) willingness and ability to commit time and thought to the foundation or nonprofit organization's affairs;

and

(iv) commitment to the foundation or nonprofit organization as a whole and not to a special interest.

(h) Boards of trustees or directors must include persons with special knowledge, expertise, and skills in investments and asset management, finance, and nonprofit administration.

(2) A foundation or nonprofit organization that receives a distribution of public assets shall submit an annual report to the commissioner and to the attorney general regarding the award of grants and other charitable activities of the entity related to its use of the public assets received.

(3) The annual report submitted under subsection (2) must be made available to the public at the principal office of the foundation or nonprofit organization.

(4) The attorney general shall retain oversight and monitoring authority over the foundation or nonprofit organization that receives the proceeds of a proposed conversion transaction.

(5) NOTWITHSTANDING ANY OTHER PROVISION OF THIS SECTION, THE PROCEEDS OF A CONVERSION TRANSACTION THAT ARE PUBLIC ASSETS OF A NONPROFIT MUTUAL BENEFIT CORPORATION IN WHICH ALL OF THE MEMBERS ARE NONPROFIT PUBLIC BENEFIT CORPORATIONS MAY BE DISTRIBUTED TO THE MEMBER NONPROFIT PUBLIC BENEFIT CORPORATIONS IF THE ARTICLES OF INCORPORATION OF THE NONPROFIT MUTUAL BENEFIT CORPORATION PROVIDE FOR THAT DISTRIBUTION.

**Section 19.** Section 35-2-609, MCA, is amended to read:

**"35-2-609. Limitations on mergers by public benefit or religious corporations.** (1) ~~Without~~ Except as provided in subsection (4) or without the prior approval of the district court for the judicial district in which the corporation's registered office is located, in a proceeding of which the attorney general has been given written

notice, a public benefit corporation or religious corporation may merge only with:

- (a) a public benefit corporation or religious corporation;
- (b) a foreign corporation that would qualify under this chapter as a public benefit corporation or religious corporation;
- (c) a wholly owned foreign or domestic business or mutual benefit corporation, if the public benefit corporation or religious corporation is the surviving corporation and continues to be a public benefit corporation or religious corporation after the merger; or
- (d) a business or mutual benefit corporation, provided that:
  - (i) on or prior to the effective date of the merger, assets with a value equal to the greater of the fair market value of the net tangible and intangible assets, including good will, of the public benefit corporation or the fair market value of the public benefit corporation if it were to be operated as a business concern are transferred or conveyed to one or more persons who would have received its assets under 35-2-725(1)(e) and (1)(f) had it dissolved;
  - (ii) it shall return, transfer, or convey any assets held by it upon condition requiring return, transfer, or conveyance in case of merger, in accordance with the condition; and
  - (iii) the merger is approved by a majority of directors of the public benefit corporation or religious corporation who are not and will not become members or shareholders in or officers, employees, agents, or consultants of the surviving corporation.

(2) At least 20 days before consummation of any merger of a public benefit corporation or a religious corporation pursuant to subsection (1)(d), notice, including a copy of the proposed plan of merger, must be delivered to the attorney general.

(3) Without the prior written consent of the attorney general or of the district court in a proceeding in which the attorney general has been given notice, a member of a public benefit corporation or religious corporation may not receive or keep anything as a result of a merger other than a membership in the surviving public benefit corporation or religious corporation. The court shall approve the transaction if it is in the public interest.

(4) A public benefit corporation or a religious corporation that is considered a nonprofit health entity, as defined in [section 1], is subject to the provisions of 35-2-617 and [sections 1 through 18]. 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."

**Section 20.** Section 35-2-617, MCA, is amended to read:

**"35-2-617. Sale of assets other than in regular course of activities.** (1) A corporation may sell, lease, exchange, or otherwise dispose of all or substantially all of its property, which may include the good will, other than in the usual and regular course of its activities on the terms and conditions and for the consideration determined by the corporation's board if the proposed transaction is approved as required by subsection (2).

(2) Unless this chapter, the articles, the bylaws, or the board of directors or members, acting pursuant to subsection (4), require a greater vote or voting by class, the proposed transaction to be authorized must be approved:

(a) by the board;

(b) by the members by two-thirds of the votes cast or a majority of the voting power, whichever is less;  
and

(c) in writing by any person or persons whose approval is required by a provision of the articles, as authorized by 35-2-232, for an amendment to the articles or bylaws.

(3) If the corporation does not have members, the transaction must be approved by a vote of a majority of the directors in office at the time the transaction is approved. In addition, the corporation shall provide notice, in accordance with 35-2-429(3), of any directors' meeting at which approval is to be obtained. The notice must also state that the purpose or one of the purposes of the meeting is to consider the sale, lease, exchange, or other disposition of all or substantially all of the property or assets of the corporation and must contain or be accompanied by a copy or summary of a description of the transaction.

(4) The board may condition its submission of the proposed transaction and the members may condition their approval of the transaction on receipt of a higher percentage of affirmative votes or on any other basis.

(5) If the corporation seeks to have the transaction approved by the members at a membership meeting, the corporation shall give notice to its members of the proposed membership meeting in accordance with 35-2-530. The notice must state that the purpose or one of the purposes of the meeting is to consider the sale, lease, exchange, or other disposition of all or substantially all of the property or assets of the corporation and must contain or be accompanied by a copy or summary of a description of the transaction.

(6) If the board needs to have the transaction approved by the members by written consent or written ballot, the material soliciting the approval must contain or be accompanied by a copy or summary of a description of the transaction.

(7) (a) ~~Except as provided in subsection (7)(b), a public benefit corporation or religious corporation must~~ shall give written notice to the attorney general 20 days before it sells, leases, exchanges, or otherwise

disposes of all or substantially all of its property if the transaction is not in the usual and regular course of its activities unless the attorney general has given the corporation a written waiver of this subsection.

(b) A public benefit corporation or religious corporation that is considered a nonprofit health entity, as defined in [section 1], is subject to the provisions of [sections 1 through 18].

(8) After a sale, lease, exchange, or other disposition of property is authorized, the transaction may be abandoned, subject to any contractual rights, without further action by the members or any other person who approved the transaction in accordance with the procedure set forth in the resolution proposing the transaction or, if no procedure is set forth, in the manner determined by the board of directors."

**SECTION 21. SECTION 35-2-722, MCA, IS AMENDED TO READ:**

**"35-2-722. Notices to the attorney general.** (1) A Except as provided in subsection (4), a public benefit corporation or religious corporation shall give the attorney general written notice that it intends to dissolve at or before the time it delivers articles of dissolution to the secretary of state. The notice must include a copy or summary of the plan of dissolution.

(2) Assets may not be transferred or conveyed by a public benefit corporation or religious corporation as part of the dissolution process until 20 days after it has given the written notice required by subsection (1) to the attorney general or until the attorney general has consented in writing to the dissolution or indicated in writing that he will not take action in respect to the transfer or conveyance, whichever is earlier.

(3) When all or substantially all of the assets of a public benefit corporation have been transferred or conveyed following approval of dissolution, the board shall deliver to the attorney general a list showing those, other than creditors, to whom the assets were transferred or conveyed. The list must indicate the address of each person, other than creditors, who received assets and indicate what assets each received.

(4) A public benefit corporation or religious corporation that is considered a nonprofit health entity, as defined in [section 1], is subject to the provisions of [sections 1 through 18]."

**NEW SECTION. Section 22. Codification instruction.** [Sections 1 through 18] are intended to be codified as an integral part of Title 50, chapter 4, and the provisions of Title 50, chapter 4, apply to [sections 1 through 18].

**NEW SECTION. Section 23. Effective date.** [This act] is effective on passage and approval.



**NEW SECTION. Section 24. Applicability.** [This act] applies prospectively to and may not be applied or interpreted to have an effect on a conversion transaction OR ANY INDIVIDUAL TRANSACTION OR SERIES OF TRANSACTIONS completed before [the effective date of this act], 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].

- END -

