

SENATE BILL NO. 531
INTRODUCED BY D. WEINBERG

A BILL FOR AN ACT ENTITLED: "AN ACT REGULATING THE CONVERSION OF A NONPROFIT HOSPITAL TO A FOR-PROFIT CORPORATION OR ENTITY OR A MUTUAL BENEFIT CORPORATION OR ENTITY; PROVIDING DEFINITIONS; PROVIDING FOR NOTICE TO THE ATTORNEY GENERAL; PROVIDING FOR PUBLIC RECORDS, NOTICE, AND HEARINGS; PROVIDING FOR EXPERTS AND COSTS; AMENDING SECTIONS 35-2-609, 35-2-617, AND 35-2-722, MCA; AND PROVIDING AN EFFECTIVE DATE."

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

NEW SECTION. **Section 1. Purpose.** The purpose of [sections 1 through 7] is to provide a process to notify the attorney general, who has statutory and common law authority over public and charitable assets, of a proposed conversion transaction in which a nonprofit hospital seeks to dispose of control or governance of all or substantially all of its public assets. [Sections 1 through 7] provide for public notice and a public hearing as the assets of a nonprofit hospital are public assets and it is intended that the public participate in the review of any proposed conversion transaction.

NEW SECTION. **Section 2. Definitions.** As used in [sections 1 through 7], the following definitions apply:

(1) "Conversion" or "conversion transaction" means any action undertaken by a nonprofit hospital to dispose of control or governance of all or substantially all of its public assets pursuant to an agreement of sale, transfer, lease, exchange, option, or joint venture or to convert to a for-profit entity or to otherwise restructure the nonprofit hospital or its public assets resulting in a change in control or governance of the entity or public assets. For purposes of this definition, a conversion transaction can occur in a single transaction or a series of related transactions.

(2) "Nonprofit hospital" means a hospital or a critical access hospital, as those terms are defined in 50-5-101, that is a public benefit corporation or a religious corporation, as those terms are defined in 35-2-114, or a mutual benefit corporation to the extent that the corporation holds assets in a charitable trust.

(3) "Ordinary course of business" means that the action in question comports with the usual and customary practices of the kind of business in which the nonprofit hospital is engaged.

(4) "Public assets" include:

- (a) all assets of a nonprofit public benefit corporation;
- (b) assets held for the benefit of the public or the community;
- (c) assets in which the public has an ownership interest;
- (d) assets owned by a governmental entity; and
- (e) assets owned by a nonprofit corporation to the extent that the corporation holds assets in a charitable

trust.

(5) "Transferee" means the person in a conversion transaction that receives the ownership or control of the nonprofit hospital that is the subject of the conversion transaction or the ownership or control of the nonprofit hospital's assets.

(6) "Transferor" means the nonprofit hospital that is the subject of the conversion transaction or the corporation that owns the nonprofit hospital that is the subject of the conversion transaction.

NEW SECTION. Section 3. Exclusions from conversion transaction. The following are not considered to be a conversion transaction:

(1) a transaction in the ordinary course of the nonprofit hospital's business that does not result in a material change in the nonprofit hospital's ownership, management structure, or nonprofit corporate mission;

(2) a transaction or series of transactions in the ordinary course of business of a nonprofit hospital if the effect of the transaction or series of transactions is not to convert the nonprofit hospital from a nonprofit to a for-profit entity or a mutual benefit corporation, to transfer the nonprofit hospital's business or operations to a for-profit entity or a mutual benefit corporation, or to transfer the control or benefit of public assets and the proceeds of public assets to a for-profit entity or a mutual benefit corporation;

(3) a change in the membership of the board of directors or officers of the nonprofit hospital or a wholly owned subsidiary of the nonprofit hospital if the change in membership does not result in a change in the nonprofit corporate status of the nonprofit hospital, does not result from a transfer of control, governance, or ownership of the nonprofit hospital, and does not result from transfer of a power of appointment of directors or officers of the nonprofit hospital or a wholly owned subsidiary of the nonprofit hospital;

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

(5) 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 hospital or a wholly owned subsidiary of the nonprofit

hospital;

(6) 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 hospital or a transaction ordered by the attorney general;

(7) purchases, sales, or transfers in the ordinary course of business for fair market value of cash or cash equivalents owned by the nonprofit hospital or any wholly owned subsidiary in exchange for goods, products, services, or an interest in property, including 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 hospital or its wholly owned subsidiary;

(8) 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 hospital or a wholly owned subsidiary of the nonprofit hospital to secure indebtedness for borrowed money, the net proceeds of which are paid solely to the nonprofit hospital or its wholly owned subsidiary, and a foreclosure or other exercise of remedies permitted with respect to an encumbrance;

(9) sale, investment, or transfer in the ordinary course of business for fair market value of an interest in property owned by the nonprofit hospital or a wholly owned subsidiary, the net proceeds of which are paid solely to the nonprofit hospital or its wholly owned subsidiary;

(10) any transfer of assets between a nonprofit hospital 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 (10) continue to be managed in a manner consistent with the public benefit purpose of the transferring nonprofit public benefit corporation;

(11) any transfer of public assets between a nonprofit hospital that is a nonprofit public benefit corporation to a separate nonprofit public benefit corporation if the management of all assets transferred by the nonprofit hospital in a transaction described in this subsection (11) continue to be managed in a manner consistent with the public benefit purpose of the transferring nonprofit public benefit corporation; or

(12) any other transaction or proposed transaction for fair market value if:

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

(b) the nonprofit hospital maintains its operations as a nonprofit hospital 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 hospital or its wholly owned subsidiary inure or will inure directly or indirectly to the benefit of any officer, employee, agent, director, or trustee of the nonprofit hospital or its wholly owned subsidiary, except for the reasonable value of services rendered pursuant to a valid contract between the officer, employee, agent, director, or trustee and the nonprofit hospital.

NEW SECTION. Section 4. Notice to attorney general. (1) Sixty days prior to completing a conversion transaction, the proposed transferor shall provide to the attorney general written notice, on a form provided by the attorney general, of its intent to initiate a conversion transaction. The notice 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 proposed to be exchanged 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; and
- (e) a copy of the conversion transaction agreement.

(2) (a) The attorney general shall notify the transferor and transferee in writing within 15 working days after receipt of the notice under subsection (1), stating that the notice is considered complete or, if the notice is incomplete, stating what additional information is required.

(b) Upon receipt that the notice is not complete, the transferor and transferee shall provide the required information or withdraw the notice within 15 working days.

(c) If the transferor and transferee supply additional information, the attorney general shall, within 10 working days of receipt of the information, either notify the transferor and transferee in writing that the amended notice is complete or deny the amended notice without prejudice to later resubmission of a completed notice form.

(3) Any material change in the terms or conditions of the proposed conversion transaction is considered a new filing for the purposes of [sections 1 through 7].

NEW SECTION. Section 5. Attorney general review. (1) Within 60 days after completion of the public hearing process provided for in [section 6], the attorney general shall conduct a legal review and may exercise the attorney general's common law and statutory authority over the transferor and transferee to ensure the

proposed conversion transaction is consistent with state and federal law and continues to protect and preserve the public assets for the benefit of the public.

(2) The attorney general may contract with experts as reasonably necessary to assist with conducting a legal review of the proposed conversion transaction, including but not limited to experts to:

- (a) perform an independent analysis of the conversion transaction under state and federal antitrust laws;
- (b) evaluate the impact of the conversion transaction on the affected community;
- (c) determine whether there has been due diligence by the transferor in evaluating the proposed conversion transaction; and
- (d) determine the existence of any conflicts of interest, foundation issues, compensation, or other issues.

(3) If the attorney general contracts for expert assistance under subsection (2), the transferor and the transferee shall each pay half of the costs reasonably incurred by the attorney general for the expert services. However, the costs incurred by the attorney general may not exceed 5% of the estimated value of the proposed conversion transaction.

(4) The attorney general may, for cause, extend the time for conducting a legal review of the proposed conversion transaction under subsection (1) for a 60-day period if:

- (a) the extension is necessary to obtain relevant information from any state agency, expert, or consultant;
- (b) the proposed conversion transaction is substantially modified after the public hearing as provided in [section 6]; or
- (c) the proposed conversion transaction involved a multisystem facility serving multiple communities rather than a single facility.

(5) Following the hearing, the attorney general may require the transferor to submit a modified proposal and may hold an additional public hearing if the modified proposal significantly changes the conversion transaction. If an additional hearing is held, the time deadlines provided in this section run from the conclusion of the additional hearing.

(6) A conversion transaction consummated in violation of any provision of [sections 1 through 7] is voidable.

NEW SECTION. Section 6. Public notice -- hearing. (1) Within 15 working days after notifying the transferor that the notice provided for in [section 4] is complete, the attorney general shall:

- (a) publish information regarding the notice on the internet and by a press release to the most widely circulated newspapers in the nonprofit hospital's service area once a week for 3 weeks; and

(b) maintain a list of persons that have requested in writing information regarding the notice of the filing of an application and notify those persons by e-mail or first-class mail.

(2) The notice under subsection (1) must:

(a) state that a notice for a proposed conversion transaction has been received by the attorney general;

(b) state the names of the parties to the conversion transaction;

(c) describe the contents of the notice, including the estimated value and timing of the conversion transaction, the potential impact on services to the public, and the distribution of assets;

(d) state the date by which a person is required to submit written comments on the notice provided for in [section 4]; and

(e) provide the date, time, and place of the public hearing on the conversion transaction.

(3) As soon as practicable, but no later than 45 days after notifying the transferor that the notice provided in [section 4] is complete, the attorney general shall hold a public hearing in the service area of the nonprofit hospital.

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

(5) The attorney general shall allow for the receipt of written comments for 5 working days immediately following the public hearing date.

(6) As part of the public hearing process, the attorney general shall solicit comments and input regarding the potential risks and benefits of the conversion on the community's access to services.

NEW SECTION. Section 7. Public records. (1) All documents and records, excluding any proprietary or confidential information as defined by law and properly labeled by the proposed transferor, submitted to the attorney general by any person in connection with the attorney general's review of the proposed conversion transaction are public records to the extent required by the provisions of applicable state law. The contents of the notice submitted to the attorney general pursuant to [section 4] are a public record, except that any proprietary information or trade secret that may by law be kept confidential is not a public record.

(2) The attorney general shall provide prompt and reasonable access to the records concerning the proposed conversion transaction to the public.

Section 8. Section 35-2-609, MCA, is amended to read:

"35-2-609. Limitations on mergers by public benefit or religious corporations. (1) Except as provided in subsection (4) or (5) 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 50-4-701, is subject to the provisions of 35-2-617 and Title 50, chapter 4, part 7.

(5) A public benefit corporation or religious corporation that is considered a nonprofit hospital, as defined in [section 1], is subject to the provisions of [sections 1 through 7]."

Section 9. 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) or (7)(c), a public benefit corporation or religious corporation 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 50-4-701, is subject to the provisions of Title 50, chapter 4, part 7.

(c) A public benefit corporation or religious corporation that is considered a nonprofit hospital, as defined in [section 1], is subject to the provisions of [sections 1 through 7].

(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 10. Section 35-2-722, MCA, is amended to read:

"35-2-722. Notices to the attorney general. (1) Except as provided in ~~subsection~~ subsections (4) and (5), 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 50-4-701, is subject to the provisions of Title 50, chapter 4, part 7.

(5) A public benefit corporation or religious corporation that is considered a nonprofit hospital, as defined in [section 1], is subject to the provisions of [sections 1 through 7]."

NEW SECTION. **Section 11. Codification instruction.** [Sections 1 through 7] 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 7].

NEW SECTION. **Section 12. Effective date.** [This act] is effective July 1, 2007.

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