

SENATE BILL NO. 531

INTRODUCED BY D. WEINBERG

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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 8] 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 8] 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 8], 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



1 customary practices of the kind of business in which the nonprofit hospital is engaged.

2 (4) "Public assets" include:

3 (a) all assets of a nonprofit public benefit corporation;

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

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

6 (d) assets owned by a governmental entity; and

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

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

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

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

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

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

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

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

1 (5) execution of a promissory note, guaranty, or other evidence of indebtedness for the amount of a loan,  
2 the proceeds of which are paid solely to the nonprofit hospital or a wholly owned subsidiary of the nonprofit  
3 hospital;

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

7 (7) purchases, sales, or transfers in the ordinary course of business for fair market value of cash or cash  
8 equivalents owned by the nonprofit hospital or any wholly owned subsidiary in exchange for goods, products,  
9 services, or an interest in property, including but not limited to stocks, shares, bonds, notes, evidences of  
10 indebtedness, negotiable instruments, or an ownership interest in an entity, to be held by the nonprofit hospital  
11 or its wholly owned subsidiary;

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

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

20 (10) any transfer of assets between a nonprofit hospital that is a nonprofit public benefit corporation and  
21 a nonprofit mutual benefit corporation in which all of the members are nonprofit public benefit corporations,  
22 provided that ~~the management of~~ all assets transferred by a nonprofit public benefit corporation in a transaction  
23 described in this subsection (10) continue to be managed in a manner consistent with the public benefit purpose  
24 of the transferring nonprofit public benefit corporation;

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

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

30 (a) the nonprofit hospital or its wholly owned subsidiary retains or will retain substantially the same

1 degree of control or governance or the same degree of ownership of the proceeds of the transaction that the  
 2 nonprofit hospital or its wholly owned subsidiary held in the assets or operations prior to the transaction or  
 3 proposed transaction;

4 (b) the nonprofit hospital maintains its operations as a nonprofit hospital and public assets or the  
 5 proceeds of public assets are maintained as public assets; and

6 (c) none of the assets or operations of the nonprofit hospital or its wholly owned subsidiary inure or will  
 7 inure directly or indirectly to the benefit of any officer, employee, agent, director, or trustee of the nonprofit hospital  
 8 or its wholly owned subsidiary, except for the reasonable value of services rendered pursuant to a valid contract  
 9 between the officer, employee, agent, director, or trustee and the nonprofit hospital.

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 11 **NEW SECTION. Section 4. Notice to attorney general.** (1) ~~Sixty days prior~~ PRIOR to completing a  
 12 conversion transaction, the proposed transferor shall provide to the attorney general written notice, on a form  
 13 provided by the attorney general, of its intent to initiate a conversion transaction. The notice must include:

- 14 (a) the name of the proposed transferor;  
 15 (b) the name of the proposed transferee;  
 16 (c) the names of any other parties to the conversion transaction agreement;  
 17 (d) the terms of the proposed conversion transaction, including but not limited to a description and  
 18 valuation of all consideration proposed to be exchanged as a part of or as a result of the conversion and the  
 19 extent to which the assets proposed to be converted are public assets; and  
 20 (e) a copy of the conversion transaction agreement.

21 (2) THE TRANSFEROR MAY NOT TRANSFER ANY PUBLIC ASSETS OR MAKE ANY CHANGE IN ITS CORPORATE  
 22 GOVERNANCE IN FURTHERANCE OF THE TRANSACTION DESCRIBED IN THE NOTICE UNTIL 60 DAYS FOLLOWING COMPLETION  
 23 OF THE PUBLIC HEARING PROCESS AS PROVIDED IN [SECTION 6].

24 ~~(2)(3)~~ (a) The attorney general shall notify the transferor and transferee in writing within 15 working days  
 25 after receipt of the notice under subsection (1), stating that the notice is considered complete or, if the notice is  
 26 incomplete, stating what additional information is required.

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

29 (c) If the transferor and transferee supply additional information, the attorney general shall, within 10  
 30 working days of receipt of the information, either notify the transferor and transferee in writing that the amended

1 notice is complete or deny the amended notice without prejudice to later resubmission of a completed notice form.

2 ~~(3)~~(4) Any material change in the terms or conditions of the proposed conversion transaction is  
3 considered a new filing for the purposes of [sections 1 through 7 8].

4  
5 **NEW SECTION. Section 5. Attorney general review.** (1) Within 60 days after completion of the public  
6 hearing process provided for in [section 6], the attorney general shall conduct a legal review ~~and~~ THE ATTORNEY  
7 GENERAL may exercise the attorney general's common law and statutory authority over the transferor and  
8 transferee to ensure the proposed conversion transaction is consistent with state and federal law and continues  
9 to protect and preserve the public assets for the benefit of the public.

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

12 (a) perform an independent analysis of the conversion transaction under state and federal antitrust laws;

13 (b) evaluate the impact of the conversion transaction on the affected community;

14 (c) determine whether there has been due diligence by the transferor in evaluating the proposed  
15 conversion transaction; and

16 (d) determine the existence of any conflicts of interest, foundation issues, compensation, or other issues.

17 (3) If the attorney general contracts for expert assistance under subsection (2), the transferor and the  
18 transferee shall each pay half of the costs reasonably incurred by the attorney general for the expert services.

19 IN ADDITION, THE TRANSFEROR AND TRANSFEREE SHALL PAY HALF OF THE EXPENSES INCURRED BY THE ATTORNEY  
20 GENERAL TO PROVIDE NOTICE OF AND CONDUCT THE HEARING PROVIDED IN [SECTION 6]. However, the costs AND  
21 EXPENSES incurred by the attorney general AND REIMBURSED BY THE TRANSFEROR AND TRANSFEREE may not exceed  
22 5% of the estimated value of the proposed conversion transaction.

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

25 (a) the extension is necessary to obtain relevant information from any state agency, expert, or consultant;

26 (b) the proposed conversion transaction is substantially modified after the public hearing as provided  
27 in [section 6]; or

28 (c) the proposed conversion transaction involved a multisystem facility serving multiple communities  
29 rather than a single facility.

30 (5) Following the hearing, the attorney general may require the transferor to submit a modified proposal

1 and may hold an additional public hearing if the modified proposal significantly changes the conversion  
 2 transaction. If an additional hearing is held, the time deadlines provided in this section run from the conclusion  
 3 of the additional hearing.

4 (6) A conversion transaction consummated in violation of any provision of [sections 1 through 7 8] is  
 5 voidable.

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

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

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

13 (2) The ~~notice~~ INFORMATION TO BE PUBLISHED BY THE ATTORNEY GENERAL under subsection (1) must:

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

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

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

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

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

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

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

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

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

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 30 **NEW SECTION. Section 7. Public records.** (1) All documents and records, excluding any proprietary

1 or confidential information as defined by law and properly labeled by the proposed transferor, submitted to the  
 2 attorney general by any person in connection with the attorney general's review of the proposed conversion  
 3 transaction are public records to the extent required by the provisions of applicable state law. The contents of the  
 4 notice submitted to the attorney general pursuant to [section 4] are a public record, except that any proprietary  
 5 information or trade secret that may by law be kept confidential is not a public record. THE INFORMATION THE  
 6 ATTORNEY GENERAL IS REQUIRED TO PUBLISH UNDER [SECTION 6] IS NOT PROPRIETARY INFORMATION OR A TRADE  
 7 SECRET.

8 (2) The attorney general shall provide prompt and reasonable access to the records concerning the  
 9 proposed conversion transaction to the public AS REQUIRED BY LAW.

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 11 NEW SECTION. SECTION 8. ATTORNEY GENERAL POWERS RETAINED. SUBJECT TO THE PROCEDURAL  
 12 REQUIREMENTS OF [SECTIONS 1 THROUGH 8], THE ATTORNEY GENERAL RETAINS ALL POWERS PROVIDED BY LAW FOR THE  
 13 PROTECTION OF PUBLIC ASSETS.

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 15 **Section 9.** Section 35-2-609, MCA, is amended to read:  
 16 **"35-2-609. Limitations on mergers by public benefit or religious corporations.** (1) Except as  
 17 provided in subsection (4) or (5) or without the prior approval of the district court for the judicial district in which  
 18 the corporation's registered office is located, in a proceeding of which the attorney general has been given written  
 19 notice, a public benefit corporation or religious corporation may merge only with:

- 20 (a) a public benefit corporation or religious corporation;
- 21 (b) a foreign corporation that would qualify under this chapter as a public benefit corporation or religious  
 22 corporation;
- 23 (c) a wholly owned foreign or domestic business or mutual benefit corporation; if the public benefit  
 24 corporation or religious corporation is the surviving corporation and continues to be a public benefit corporation  
 25 or religious corporation after the merger; or
- 26 (d) a business or mutual benefit corporation, provided that:
- 27 (i) on or prior to the effective date of the merger, assets with a value equal to the greater of the fair  
 28 market value of the net tangible and intangible assets, including good will, of the public benefit corporation or the  
 29 fair market value of the public benefit corporation if it were to be operated as a business concern are transferred  
 30 or conveyed to one or more persons who would have received its assets under 35-2-725(1)(e) and (1)(f) had it

1 dissolved;

2 (ii) it shall return, transfer, or convey any assets held by it upon condition requiring return, transfer, or  
3 conveyance in case of merger, in accordance with the condition; and

4 (iii) the merger is approved by a majority of directors of the public benefit corporation or religious  
5 corporation who are not and will not become members or shareholders in or officers, employees, agents, or  
6 consultants of the surviving corporation.

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

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

15 (4) A public benefit corporation or a religious corporation that is considered a nonprofit health entity, as  
16 defined in 50-4-701, is subject to the provisions of 35-2-617 and Title 50, chapter 4, part 7.

17 (5) A public benefit corporation or religious corporation that is considered a nonprofit hospital, as defined  
18 in [section 4 2], is subject to the provisions of [sections 1 through 7 8]."

19

20 **Section 10.** Section 35-2-617, MCA, is amended to read:

21 **"35-2-617. Sale of assets other than in regular course of activities.** (1) A corporation may sell, lease,  
22 exchange, or otherwise dispose of all or substantially all of its property, which may include the good will, other  
23 than in the usual and regular course of its activities on the terms and conditions and for the consideration  
24 determined by the corporation's board if the proposed transaction is approved as required by subsection (2).

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

28 (a) by the board;

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

30 and



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

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

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

11 (5) If the corporation seeks to have the transaction approved by the members at a membership meeting,  
12 the corporation shall give notice to its members of the proposed membership meeting in accordance with  
13 35-2-530. The notice must state that the purpose or one of the purposes of the meeting is to consider the sale,  
14 lease, exchange, or other disposition of all or substantially all of the property or assets of the corporation and  
15 must contain or be accompanied by a copy or summary of a description of the transaction.

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

19 (7) (a) Except as provided in subsection (7)(b) or (7)(c), a public benefit corporation or religious  
20 corporation shall give written notice to the attorney general 20 days before it sells, leases, exchanges, or  
21 otherwise disposes of all or substantially all of its property if the transaction is not in the usual and regular course  
22 of its activities unless the attorney general has given the corporation a written waiver of this subsection.

23 (b) A public benefit corporation or religious corporation that is considered a nonprofit health entity, as  
24 defined in 50-4-701, is subject to the provisions of Title 50, chapter 4, part 7.

25 (c) A public benefit corporation or religious corporation that is considered a nonprofit hospital, as defined  
26 in [section 4 2], is subject to the provisions of [sections 1 through 7 8].

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

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2           **Section 11.** Section 35-2-722, MCA, is amended to read:

3           "**35-2-722. Notices to the attorney general.** (1) Except as provided in ~~subsection~~ subsections (4) and  
4 (5), a public benefit corporation or religious corporation shall give the attorney general written notice that it intends  
5 to dissolve at or before the time it delivers articles of dissolution to the secretary of state. The notice must include  
6 a copy or summary of the plan of dissolution.

7           (2) Assets may not be transferred or conveyed by a public benefit corporation or religious corporation  
8 as part of the dissolution process until THE LATER OF 20 days after it has given the written notice required by  
9 subsection (1) to the attorney general or, IN A TRANSACTION SUBJECT TO [SECTIONS 1 THROUGH 8], THE TIME PERIODS  
10 PROVIDED IN [SECTION 5] HAVE ELAPSED OR until the attorney general has consented in writing to the dissolution or  
11 indicated in writing that he will not take action in respect to the transfer or conveyance, ~~whichever is earlier.~~

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

16           (4) A public benefit corporation or religious corporation that is considered a nonprofit health entity, as  
17 defined in 50-4-701, is subject to the provisions of Title 50, chapter 4, part 7.

18           (5) A public benefit corporation or religious corporation that is considered a nonprofit hospital, as defined  
19 in [section 4 2], is subject to the provisions of [sections 1 through 7 8]."

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21           NEW SECTION. Section 12. Codification instruction. [Sections 1 through 7 8] are intended to be  
22 codified as an integral part of Title 50, chapter 4, and the provisions of Title 50, chapter 4, apply to [sections 1  
23 through 7 8].

24

25           NEW SECTION. Section 13. Effective date. [This act] is effective July 1, 2007.

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