

ATTORNEY GENERAL'S GUIDELINES FOR
TRANSFERS OF NONPROFIT ACUTE CARE HOSPITALS AND HMOs
(M.G.L. c. 180, §8A(d) as added by c. 141 of the Acts of 2000)

I. INTRODUCTION

These Guidelines are to be used solely for reviewing sales, leases, exchanges or other dispositions of a substantial amount of the assets or operations of nonprofit acute-care hospitals and health maintenance organizations ("HMOs"), as defined by M.G.L. c. 180, §8A(d) as added by c. 141 of the Acts of 2000. All other dispositions of charitable assets by charitable corporations formed under c. 180 are to be reviewed pursuant to M.G.L. c. 180, §8A(c) and/or general charities law. Transactions involving nonprofit acute-care hospitals and nonprofit HMO's (each, an "Institution," and collectively, "Institutions") are subject to specific procedural requirements that differ significantly from those applicable to charitable corporations generally. Those procedural requirements are discussed in Part II.

It is the policy of the Massachusetts Attorney General's office to thoroughly review each transaction subject to review under §8A(d), to obtain all relevant financial, corporate and transactional information, and to consider all of the factors enumerated in M.G.L. c. 180, §8A(d)(1)(i)-(v). The role of the Attorney General is to fairly, but vigorously, enforce the provisions of the Massachusetts statutes governing public charities and Massachusetts charitable trust law so as to fully protect the charitable assets for the benefit of the public, who are the beneficiaries of the trust on which all charitable corporations hold their assets.

These Guidelines are for the use of Institutions and their attorneys who must bring transactions for review under §8A(d) to the Division of Public Charities in the Office of the Attorney General. They are not intended to be a complete or exclusive list of items that the Division will review and/or investigate, as these will vary on a case-by-case basis. Instead, they

are intended to provide broad, general guidance with respect to issues that are commonly found in such transactions.

II. DEFINITIONS OF TERMS IN THE STATUTE

A. "Sale, lease, exchange"

In addition to sales, leases or exchanges, the Division will review all transactions in which there is a disposition of a substantial amount of the Institution's assets or operations, regardless of the form of the transaction. This definition may include leases with terms in excess of five years (whether of real estate or of equipment); options; management agreements with terms in excess of five years that do not fit within a safe harbor described in the Internal Revenue Service Rev. Proc. 97-13, as amended; joint ventures; sales of receivables (factoring); or other transactional devices. Chapter 180, § 8A(d) does not apply to transactions exclusively between Institutions and other public charities (see "Other Disposition" definition below regarding financings), nor does it apply to the purchase and sale of marketable securities on a fair market value basis or to the conversion of securities into cash. However, the Division will continue its practice of reviewing transactions that implicate its mandate to see to the due application of charitable funds pursuant to general charities laws.

B. "Substantial Assets or Operations"

For the purpose of determining whether an asset disposition falls within the jurisdiction of §8A(d), the Attorney General will give primary consideration to the book value of the total assets as reflected on the Institution's most recent balance sheet. If the assets being disposed of constitute 20% or more of the Institution's assets, a review under § 8A(d) will be required unless the assets are comprised of marketable securities purchased, sold or converted into cash by the Institution on a fair market value basis.

For the purpose of determining whether a disposition of operations requires a §8A(d) review, the Attorney General will give primary consideration to the gross revenues generated by

the operations as reflected on the Institution's most recent audited financial statements. If the operations being disposed of constitute 20% or more of the Institution's gross operating revenue, a review under §8A(d) will be required.

In a case where the Institution is a hospital that is part of a system (regardless of whether it holds an individual license), the 20% test will be applied based upon the assets or revenues of that hospital individually if the hospital is owned by a separate charitable corporation. If the hospital is owned by a charitable corporation that owns more than one hospital, the 20% test will be based upon the assets and revenues of such corporation. The 20% guideline is not meant to preclude the Attorney General from reviewing transactions otherwise subject to §8A(d) that do not meet the thresholds described above, if the facts warrant such review. If a transaction involves, for example, the sale of an operation that is generating profits, the loss of which will have a negative impact on the financial resources of the Institution, the Attorney General may review the transaction.

This is an and/or test, i.e., if the transaction meets either test (disposition of assets that account for 20% or more of the Institution's total assets, or disposition of operations that account for 20% or more of the Institution's gross revenues) or meets the tests in combination, the provisions of §8A(d) will apply.

For the purposes of determining whether 20% or more of assets or operations are being disposed, the Attorney General will aggregate any dispositions within a 12-month period. A review will take place where aggregated dispositions exceed 20%, even if the last disposition is a small one. This will require Institutions to give notice to the Attorney General of anticipated or planned covered transactions within a certain 12-month period so that the Attorney General can determine whether the percentage threshold will be met.

C. "Other disposition"

This term excludes mortgages, pledges or granting of a security interest pursuant to routine financing and re-financing when such transactions are in the ordinary course of business and are the subject of a tax-exempt bond issue or a borrowing from a lender whose primary business is making loans. Notice to the Attorney General for such routine financings and re-financings is not required. An example of a non-routine financing which might trigger §8A(d) under the enumerated factors (d)(1)(i-v) is any financing in which the collateral is equal to or exceeds 20% of the assets or operations of the Institution and is financed by a lender whose primary business is not making loans. A waiver may be granted if it is found that the financing terms do not jeopardize the continued operation of the Institution and are in keeping with the factors enumerated in M.G. L. c. 180, §8A(d)(1)(i)-(v).

This term also does not include foreclosure, bankruptcy or receivership. However, the Attorney General would be entitled to receive notice of these events under M.G.L. c. 12, §8G.

D. "A person or entity other than a public charity"

This term excludes from required review corporations and other entities that are exempt from federal income tax under sections 501(c)(3) of the Internal Revenue Code or which are otherwise public charities. This term includes business corporations, limited liability companies, partnerships, limited liability partnerships, and any other entity that has owners, unless all of its owners are public charities. When an otherwise covered transaction involves a transferee that is not a for-profit entity but is nevertheless "other than a public charity" (e.g., a municipality or state agency), the Attorney General may on a case-by-case basis determine it is in the public interest to subject the transaction to an investigation.

E. Other Definitions Used in These Guidelines

In these Guidelines, a proposed sale, lease, exchange or other disposition of a substantial amount of assets or operations subject to review under §8A(d) is referred to as a "Transfer" or

“Proposed Transfer,” and the party to a Transfer or Proposed Transfer other than the Institution is a “Transferee.”

III. PROCEDURAL REQUIREMENTS

A. Notice

Within five business days following the execution of a binding agreement pertaining to a Proposed Transfer, the Institution must provide written notice of not less than 90 days prior to the effective date of such Proposed Transfer to the Attorney General. (M.G.L. c. 180, §8A(d)(1)). That notice shall be considered filed with the Attorney General upon receipt by the Public Charities Division. The Institution should clearly identify the document as a notice pursuant to c. 180, §8A(d). Institutions should consider providing notice prior to execution of a binding agreement if practicable.

B. Contents of Notice - The 8A(d) Summary Statement

A §8A(d) Summary Statement is used by the Division of Public Charities to initially assess the Proposed Transfer. The Institution should use this opportunity to provide as much public information as possible to facilitate the Attorney General’s review and to narrow the scope of subsequent discovery requests. Where possible copies of documents, such as transaction documents, minutes, consultant analyses and other relevant documents should be attached to the notice.

The written notice of a Proposed Transfer by an Institution should consist of a narrative (with supporting documentation whenever possible) describing in as much detail as possible, the following areas of inquiry that may be reviewed by the Attorney General:

- (1) A summary of the facts and circumstances the Institution’s Board of Directors considered in concluding that the Proposed Transfer is necessary.

(2) A summary of the process employed by the Institution's Board of Directors to consider alternatives to the Proposed Transfer (for example, delegation of responsibility to any committee or a group other than the entire Board).

(3) A summary of the discussions by the Institution's Board of Directors and/or any committee concerning the Proposed Transfer by the Institution.

(4) A summary of all proposed agreements to be executed by the Institution with the Transferee relating to the proposed transaction.

(5) A summary of any agreements between the Institution and any consultant retained by it to assist with the process of considering whether to enter into a transaction for the Proposed Transfer to the Transferee, including any documents relating to a valuation of the assets or operations being disposed of, any engagement letters, and any and all materials relied on by the consultant to support any conclusion as to valuation.

(6) A discussion of the selection process including:

(a) The reasons why any potential Transferee was excluded from further consideration for the assets or operations involved in the Proposed Transfer.

(b) Copies of all Requests for Proposal sent to any potential Transferee and responses received thereto.

(c) A summary of the discussions reflecting the deliberative process used by the Institution in selecting the Transferee as the entity to participate in the Proposed Transfer.

(d) A summary or copy of each proposal received by the Institution from any potential Transferee suggesting the terms of a Proposed Transfer and any analysis thereof by the Institution's management or any consultant or agent or employee of the Institution.

(e) A summary or copy of any proposed agreement, written or oral, between any officer and/or director of the Institution and the Transferee.

(7) A summary of any discussions and all writings of any kind that pertain to consideration by the Institution's Board of Directors of the alternative of continuing as a nonprofit entity or partnering with a nonprofit entity.

(8) Copies of any documents or writings of any kind that relate or refer to any personal financial benefit that a proposed affiliation between the Institution and the Transferee would confer on any officer, director, employee, medical staff member, or other person or entity affiliated with the Institution or any family member of any such person.

(9) The identity of each and every officer, trustee, or director of the Institution (or any family member of such persons) or any affiliate of the Institution who has any financial interest in any company, firm, partnership, or business entity currently doing business with the Transferee or any affiliate of the Transferee. Financial interest does not include stock in a publicly-held company that have been purchased on terms generally available to the public.

(10) A statement containing any other information the Institution believes the Attorney General should consider in deciding whether the Proposed Transfer is in the public interest.

(11) The §8A(d) summary may be updated by the Institution at any time. The Institution should indicate where additional information is needed and set forth the time frame in which the entity intends to provide that information.

C. Application for a Waiver

Chapter 180, §8A(d)(1) states that no notice is required if the Attorney General executes a written waiver of such a notice. Institutions seeking a waiver from the Attorney General's Office must apply for a waiver and provide at least the following information:

- (1) A description of the Proposed Transfer;
- (2) A statement of the reasons the Proposed Transfer is not subject to §8A(d) review;

(3) If the reason given is related to the 20% rule (described in Part II, Definitions, above) then the Institution must supply financial data supporting its analysis at the time of the request for a waiver; and

(4) If any other reason is proposed, documentary evidence, as necessary, must be included with the request for the waiver.

Section 8A(d)'s time limitations, and the necessity for the Attorney General to collect and review considerable documentary information within a relatively short time frame, will hinder the Division's ability to continue the practice of accepting a brief letter containing both a waiver application and a notice. Therefore, Institutions are urged to weigh carefully whether the Proposed Transfer warrants a waiver. In the alternative, the Institution may apply for a waiver, but also supply the information requested under Part III, Section B of these Guidelines.

D. Public Hearing

(1) The Attorney General will ordinarily conduct a public hearing, but in certain matters he may, instead, while still following the statutory requirements, co-sponsor a public hearing with another state agency. This does not preclude the Institution from conducting its own public meetings, but such Institution-sponsored meetings do not relieve the Attorney General's office of its obligation to conduct an independent public hearing where the statute, facts, and circumstances warrant the Attorney General holding a hearing.

(2) Generally, the Attorney General's public hearing will be held as soon as practically possible so as to allow full expression and consideration of public concerns. Based upon relevant facts and circumstances, the Attorney General may change the schedule of the public hearing.

The hearing will be held in a location convenient to the population served by the Institution. Any person or entity, either before, during or after the hearing, may provide the Attorney General with written comments on the Proposed Transfer or any documents relevant to

the Attorney General's consideration of the Proposed Transfer. At the public hearing, the Attorney General will provide as many people with an opportunity to make statements as reasonable time constraints for the hearing permit. At least 21 days advance notice of the hearing will be provided, except in exigent circumstances. The Institution will be required to publish notice of the hearing in a newspaper of general circulation in the service area of the Institution. The notice should include the name of the Institution, the name of the Transferee, or other parties to the Proposed Transfer, and the anticipated consideration that will be paid by the Transferee.

The public has a right by statute to request from the Institution a detailed summary of the Proposed Transfer and copies of all transaction and collateral agreements. Compliance with this provision of the statute does not require disclosure of confidential trade secret, commercial, or financial information contained in schedules or exhibits of those agreements.

The Attorney General will continue the past practice of reviewing the transaction summary before authorizing its dissemination to the public. The Attorney General will continue to make public information about the Proposed Transfer available upon request, as that information is gathered during the discovery phase of the investigation.

E. Cost Reimbursement

(1) The Attorney General will assess the Transferee for reasonable costs to enable the Attorney General to review the Proposed Transfer. Note that this is a change from the Attorney General's prior practice of charging the Institution with the costs associated with the investigation and review. Transferees should expect to provide a check payable to the Commonwealth of Massachusetts within 15 days of the date the Institution provided notice under §8A(d), in an amount agreed upon with the Attorney General's Office. If the Attorney General determines that the circumstances so warrant, payments may be made in installments.

In determining the reasonable costs to be assessed, the Attorney General will consider, among other things, engagement of an expert to review the Proposed Transfer, costs associated

with the public education process and obtaining public input, and administrative costs. Reasonableness will be determined on a case-by-case basis. Past practice has been to assemble a budget for the investigation by asking for requests for proposals from experts, budgeting for the site of the public hearing(s), and considering printing and other costs. The Attorney General attempts to make as accurate as possible an advance estimate of costs for the actual investigation. If, during the course of the investigation, costs exceed budget estimates, the Transferee will pay for these additional costs.

The principles for reaching a reasonable estimate outlined in this provision apply also to the engagement of an independent health care access monitor as well.

F. Information gathering during the investigation

To the extent the following documents are not provided along with the notice, the Attorney General may seek, either informally or through document requests, any or all of the following documents:

(1) All Transfer documents, including all collateral or ancillary agreements that may involve the Institution's officers, directors, or employees, e.g., employment contracts, stock option agreements in the Transferee, or other similar arrangements. Where the Institution has related business entities (e.g., partially or wholly-owned subsidiaries, affiliated entities, partnerships), whether nonprofit or for-profit, all documents deemed reasonably needed by the Attorney General to determine the effect on these entities must also be provided.

(2) For joint venture transactions, it is essential to provide all asset contribution agreements (and relevant valuation materials), all partnership, limited liability company ("LLC") or limited liability partnership ("LLP") documents, management contracts, option agreements, or other contractual agreements which comprise the total transaction.

It is also essential to provide the Attorney General with sufficient financial information regarding the Institution post-closing (e.g., pro forma, asset/liability and income/expense

statements) to enable the Attorney General to determine whether the joint venture is a prudent investment for the Institution under Massachusetts fiduciary law and whether the effects of the joint venture on the Institution's on-going enterprises (if any) have been carefully considered.

(3) In Proposed Transfers involving hospitals that are part of an integrated delivery system ("IDS"), it is important to provide all information deemed reasonably necessary by the Attorney General to evaluate the effects of the Proposed Transfer on each nonprofit component of the IDS. In this regard, contracts between IDS entities and related physician groups may also need to be reviewed.

(4) Financial documents of the Institution including audited financial statements, business projection data, current capital asset valuation data (at market value), and any other records upon which future earnings, projections, existing asset values, and a fair market value analysis of the Proposed Transfer have been or could be based. Where the Institution has related business entities (e.g., partially or wholly-owned subsidiaries, affiliated entities, partnerships), whether nonprofit or for-profit, similar data should be provided for them.

(5) Relevant material contracts (assets and liabilities) which may affect value must be provided. These should include not only business contracts, but also employee contracts including buy-out provisions, profit-sharing agreements, or other agreements.

(6) With respect to the Transferee, all ownership information necessary to determine whether it is a wholly independent third party involved in an arms-length acquisition with the Institution or whether self-dealing is involved. Particular attention will be paid when the Transferee is also acquiring interests in entities in which officers, directors, or employees of the Institution have an ownership interest.

(7) In Proposed Transfers where all or any part of the consideration is not cash, all documents relating to the non-cash consideration (e.g., stock, notes), including the Institution's valuations of security for loans, stock restrictions, or other consideration.

(8) All information, including the Institution's articles of organization, bylaws, endowment fund documentation, trust restrictions, trust expenditure history, and other information necessary to define any trusts upon which the Institution's assets are held.

(9) All documentation regarding the process by which Board approval of the Proposed Transfer was obtained.

(10) Tax-sensitive information, including the existence of tax-exempt debt that must be redeemed, and any related party transactions as defined in the instructions to the Form PC.

(11) With respect to the remaining or successor charity, similar information to that described in paragraphs 8 and 9 above. In addition, all relevant information with respect to the Institution's and/or successor organization's officers, directors, and employees (both current and post-disposition) in order to determine independence from the Transferee, Board make-up, charitable purposes, and any financial arrangements with officers, directors, or employees which may be affected by the Proposed Transfer should be provided. Particular attention will be paid to financial arrangements that might affect an individual's objectivity in supporting or approving the Proposed Transfer.

(12) Subject to any applicable exceptions under the state public records law and any applicable state or federal privacy laws, it is the policy of the Attorney General's office to make available to the public, to the maximum extent possible under the law, all of the information obtained in the review process.

An open process will increase the public's confidence in the review procedure and reduce, if not eliminate, any concerns that these assets and/or operations are being adequately and properly protected in accordance with § 8A(d) (i) - (v).

IV. SUBSTANTIVE REVIEW

The substantive review has seven specific components: (A) determination that the Proposed Transfer complies with applicable general nonprofit and charities law; (B) review of

transactional details; (C) fair market value analysis; (D) conflict of interest review; (E) public interest review; (F) appropriate charitable use of assets post transaction (*cy pres*) determination; and (G) an independent health care access monitor. All components are essential to a proper review. The Attorney General's Office will investigate or consider the following issues to assure compliance with the components of the review.

A. Compliance with Nonprofit and Charities Law

Under the general nonprofit corporations law, the role of the Attorney General is to oversee the actions of nonprofit directors in order to ensure that they meet their duties of due care and loyalty and to ensure that the assets of public charities are used for their charitable purposes.

(1) Consideration of reasonably viable alternatives.

Whether, within its due diligence review, the Institution thoroughly considered reasonably viable alternatives, including mergers and/or strategic alliances with other nonprofit entities (both locally and regionally based), and alternative transactions (e.g., dispositions of assets, leases, joint ventures) with for-profit partners. Related relevant issues include: the Institution's continued financial viability (both short-term and long-term); its ability to carry out its charitable mission under each of the proposed alternatives; and the desire and need for local community input and/or control of the charitable assets and/or operations.

(2) Self-Dealing Transactions

The Attorney General will review whether the Proposed Transfer involves self-dealing. Insider-Transferees and the Institution should each have separate counsel, and separate valuation consultants, or other consultants. Special concern will exist in those cases where no attempt has been made to offer the assets and/or operations to alternative, disinterested Transferees through employment of investment bankers or other similar consultants.

In all cases, independent directors (and this Office) should be provided with independent valuation information and should exercise diligence to insure that the Proposed Transfer is the most advantageous available to the Institution.

(3) In all cases, the independent directors' decision must be guided by the fiduciary standards set forth in M.G.L. c. 180, §6C.

(a) The Attorney General's review will focus on the duty of care. Key elements will include whether qualified consultants were retained to evaluate the benefit to the Institution, valuation issues, and tax consequences to the Institution.

(b) Special attention will be paid where there has been no significant effort to market the charitable asset widely to insure maximum return.

(4) Role of Advisors

The Office will review decisions that were based upon advice given by investment banking firms or other advisers that provide merger and acquisition services on a contingent fee basis when these firms are used for the Institution's initial review of alternatives (as distinguished from implementing a decision to sell) because legitimate concerns may arise that the process became skewed toward a disposition or joint venture with a for-profit partner simply because economic incentives for the advisor may be greater in such a transaction.

B. Transactional Details

All terms and conditions of the Proposed Transfer will be carefully scrutinized.

Particular emphasis will be placed on the following:

- (1) Contingencies that affect the purchase price.
- (2) Indemnification provisions.
- (3) Where stock or other non-cash consideration represents a significant portion of the Transfer price, issues of control, restrictions on sale, possible adverse tax consequences (e.g., redemption of tax-exempt bonds, minimum pay-out requirements, transactions involving

disqualified persons), possible future dilution of interest (e.g., through stock options, retention of treasury stock), lack of liquidity, imprudent concentration of assets in a single holding, discount for minority interest, voting versus non-voting stock, and other concerns will need to be considered.

(4) Where notes are part of the Transfer consideration, security, discount to present value, marketability of note, tax consequences, and other concerns, will need to be considered.

(5) Where the Institution has related business entities (e.g., partially or wholly-owned subsidiaries, affiliated entities, partnerships), whether nonprofit or for-profit, special attention will be paid to the terms and conditions of the Proposed Transfer so as to insure that arbitrary and/or unfavorable allocations of assets, liabilities, costs, or proceeds are not used to reduce the Institution's share of the total purchase price.

(6) Where the final purchase price is related to future earnings, special protections may be necessary to prevent unfavorable allocations of costs or corporate expenditures to depress earnings over the short-term.

(7) In joint venture transactions, key issues for review will include valuation of both the contributed assets and resulting partnership, LLC or LLP interests for all parties; management contract terms; partnership, LLC or LLP operating agreement terms; liquidity; dividend and/or earnings distribution terms and guarantees; access to capital; capital contribution terms; and potential dilution of the Institution's interest (either by forced dispositions or capital calls).

(8) In joint venture or other similar transactions, an issue may arise as to whether a retained interest in a for-profit entity by the Institution constitutes a prudent investment. Key issues in this regard will be the percentage of the Institution's assets held in a single investment, control of the investment, return on the investment, access to capital, loss of the control premium, and liquidity and/or discounts in value and/or a lack thereof.

(9) Where there is a recent history of substantial losses by the Institution, the Attorney General will consider whether there is any evidence that any manipulation of corporate revenues or expenses occurred so as to adversely affect earnings for the purpose of facilitating a Proposed Transfer.

C. Fair Market Value

This is the key issue in most cases. Simply put, the Institution is entitled to receive maximum value for its assets or operations. Because the Office will normally review valuations of a "going business concern," key items include:

(1) Ensuring all assets are valued at market value and not carried at book value (this is particularly important with respect to land and securities).

(2) In valuing future earnings, projected earnings, business plans, anticipated contracts, and disposition-timing are crucial pieces of information.

(3) Ensuring the assets and/or operations have been diligently marketed by investment bankers, or others, in an attempt to generate multiple bidders and maximum value for the Institution.

(4) Whether there are competing offers.

(5) Whether business valuation appraisals have been obtained and whether they include stock offerings, IBO values, and comparable dispositions, including control premiums.

(6) Whether there has been adequate professional assistance (e.g., lawyers, investment bankers, accountants), indicating reasonable inquiry and due diligence.

(7) Values are normally estimated within ranges. If a Proposed Transfer is at the lower end of the range, the Attorney General will look for improper benefit offered by the Transferee to the Institution's officers, directors and employees, purchases by the Transferee (or its affiliate) of entities owned (in whole or part) by Institution insiders on unreasonably favorable terms, or other factors.

(8) Non-cash Proposed Transfers will be scrutinized with special care to obtain an equivalent cash value for the consideration paid.

(9) The Attorney General will review specific items peculiar to nonprofits that can depress earnings and which may cease or decrease upon disposition (e.g., community benefits). These items will be considered if not mandated to be continued by the purchase agreement or applicable law so as to avoid understating value.

(10) In joint ventures, the Attorney General will look to see that parties value not only the Institution's assets and/or operations being contributed to the venture, but also the value of the joint venture interest received by the Institution in exchange for those assets and/or operations. Lack of liquidity, access to capital, control, guaranteed payouts or dividends, or other factors may all serve to reduce the value of the interests received. Separate valuation analysis of this interest will normally be required to determine what, if any, discount should be applied to the value of this interest.

(11) When assessing the fair market value of the Proposed Transfer, the Attorney General will consider the amounts paid by the Transferee for reimbursing the Attorney General's review costs under Part III, Section E and for funding the independent health care monitor under Part IV, Section G.

D. Conflict of Interest

All Proposed Transfers will be investigated to insure that no officer, director, employee, spouse or family member, or other private party receives an improper benefit from the Proposed Transfer. Chapter 180, §8A(d)(6) specifically prohibits officers, directors, incorporators, members, employees, staff, physicians, experts or advisors of the Institution from deriving improper benefit from the Proposed Transfer. Key areas of inquiry normally include offers to the Institution's officers, directors and employees by the Institution or the Transferee, including but not limited to:

- (1) stock options;
- (2) pension plans and perquisites;
- (3) performance bonuses;
- (4) corporate loans;
- (5) so-called “golden parachute” arrangements;
- (6) excessive salaries;
- (7) any so-called “side deal” for any officer, director or employee (or entities controlled by such persons); or
- (8) above-market compensation for any officer, director or employee (or entities controlled by such persons).

Chapter 180 §8A(d)(6) prohibits the above-enumerated individuals from investing in the Transferee for a period of three years following the consummation of the Proposed Transfer.

Where the proceeds of a Proposed Transfer are tied to the provision of services by the Transferee (e.g., health services to the poor in lieu of cash or guaranteed payments by the Institution to the Transferee for indigent services), they will be carefully scrutinized for necessity, valuation, and verifiability.

Transferees will not be permitted to maintain control of the Proposed Transfer process through the creation of a Transferee-controlled foundation or through appointments to the Institution’s Board.

The Attorney General’s Office will continue its practice of sending out interrogatories to key decision-makers to verify that they: (a) will not improperly benefit from the Proposed Transfer; (b) have carefully considered all viable alternatives to the Proposed Transfer; and (c) have otherwise properly carried out their duties of due care and loyalty. Interrogatories are sent out as part of the review process and also post-transaction.

E. Public Interest Review

With the enactment of c. 180, §8A(d), the Legislature has increased the Attorney General's responsibilities with regard to Proposed Transfers involving Institutions. The Legislature has directed the Attorney General to consider the broader public interest. Where applicable, factors that might be considered are the continuation, enhancement or reduction of free care, access to health care services and community benefits.

In addition, an anti-trust review may be required. Notice of every proposed Transfer meeting applicable state statutory and/or regulatory thresholds should be provided to the Attorney General's Consumer Protection/Anti-trust Division. Note that any investigation that the Consumer Protection/Anti-Trust Division may conduct is independent of the charities law trust review and that the time frames for charities law reviews are fixed by statute. In addition, proposed Transfers meeting applicable federal statutory and/or regulatory thresholds will require Hart-Scott-Rodino clearance as a condition of closing independent of the Attorney General's Office.

F. Charitable Asset Uses

(1) Attendant to the disposition of charitable trust assets and/or operations, it is important to ensure that the disposition proceeds are used for their proper purposes. In this regard, all restricted funds must remain segregated and used for their restricted purposes. With respect to general corporate funds, the remaining (or successor) charity must utilize the assets for a similar charitable purpose. The Attorney General will continue the past practice of emphasizing the needs of the medically vulnerable.

(2) In those instances where a disposition of assets results in the reallocation of funds from an operational use to a grant-making use, it is particularly important to insure that a continuation of a charitable purpose is maintained. Where specific charitable purposes are likely to be lost or significantly diminished by the Proposed Transfer, restrictions will be placed on the proceeds of the Proposed Transfer to mitigate those losses and to insure that those charitable

purposes continue to be promoted. In almost all such cases, formal approval by the court will be required because a modification of purposes for the charitable assets is involved.

(3) These Guidelines continue the practice of a two-step process, i.e., closing the Proposed Transfer as a first step with the determination of the proper use of the proceeds of the Proposed Transfer determined at a later time (subject to adequate safeguards with respect to both capital and accrued income), where warranted.

(4) Chapter 180, §8A(d)(4), spells out the role of the Attorney General in foundation planning should a charitable fund result from the Proposed Transfer and the Institution does not continue operations. The Attorney General reviews the plan and the plan must be submitted to the court for approval. The governance of the fund must be broadly based in the community. This means that the board members of the Institution may not be the board members of the successor charitable fund. The Attorney General will conduct a public hearing in connection with review of the plan for governance of the resulting charitable fund. An appropriate portion of the proceeds of the Proposed Transfer may be used to engage assistance for the development of a community-based plan, if such assistance is deemed necessary by the Attorney General. The Attorney General will play an active role in governance planning to assure that any plan reflects the views and needs of the community served by the Institution.

G. Independent Health Care Access Monitor

Chapter 180 §8A(d) changes prior practice with respect to the engagement of an Independent Healthcare Access Analyst in the following ways:

(1) The Attorney General makes a determination, in consultation with the Department of Public Health, as to the necessity of an independent health care access monitor to be engaged by the Department of Public Health. The monitor reports quarterly on community health care access, including levels of free care, to the Attorney General, the Department of Public Health,

and the Legislature's Health Care Committee. The funding is to be provided by the Transferee for three years following the Proposed Transfer.

(2) Factors to be considered in making the determination as to whether an independent health care access monitor should be engaged include the nature and scope of the Proposed Transfer. A Proposed Transfer in which all or substantially all of the assets or operations of the Institution are being sold to a Transferee may warrant monitoring, whereas the sale of a portion of the assets and/or operations of the Institution may not. Also, where there is in place a plan pursuant to M. G .L. c. 111, §51G(4), a monitor may be required to assure that the plan is followed.

H. Court Approval of the Proposed Transfer

Section 33 of c. 141 of the Acts of 2000 states that nothing contained in the provisions of §8A(d) as added by c. 141 of the Acts of 2000 "shall be construed to limit the existing authority of the Attorney General...or the court to review, approve, disapprove, or impose conditions upon a transaction or disposition under existing law." In keeping with past practice, the Attorney General will continue to take into account at least the following factors:

- (a) The size of the Proposed Transfer relative to the size of the on-going charitable enterprise;
- (b) The extent to which, in the Attorney General's view, the standards and requirements of § 8A(d) are satisfied;
- (c) The effect of the Proposed Transfer on the surviving charitable corporation (e.g., whether a Proposed Transfer involves only the liquidation of surplus assets or operations to provide needed capital for remaining operations);
- (d) Whether the Proposed Transfer involves insiders to the Institution; and
- (e) Whether the Proposed Transfer will materially change the mission of the Institution.