

February 17, 2003

PROPOSED AMENDMENTS TO SENATE BILL NO. 2348

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact sections 10-33-148 and 10-33-149 and a new subsection to section 50-24.4-15 of the North Dakota Century Code, relating to transactions by nonprofit corporations that operate or control hospitals and nursing homes and property-related costs for nursing homes; to amend and reenact sections 10-33-144, 10-33-145, 10-33-146, and 10-33-147 of the North Dakota Century Code, relating to transactions by nonprofit corporations that operate or control hospitals or nursing homes; and to provide a continuing appropriation.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. AMENDMENT.** Section 10-33-144 of the North Dakota Century Code is amended and reenacted as follows:

**10-33-144. Transaction by a nonprofit corporation ~~doing business as~~ operating or controlling a hospital or nursing home - Notice to attorney general - Waiting period.**

1. A nonprofit corporation ~~doing business as~~ operating or controlling a hospital or nursing home shall notify the attorney general in writing before closing an agreement or a transaction that will:
  - a. Sell, lease, transfer, exchange, option, convey, ~~mortgage, create a security interest in,~~ or otherwise dispose of to a for-profit ~~organization corporation or entity~~ or a nonprofit corporation or entity if fifty percent or more of the assets ~~or operations of the corporation doing business as a hospital or fifty percent or more of the assets or operations of a related organization~~ of the selling corporation are involved in the agreement or transaction;
  - b. ~~Sell, lease, transfer, exchange, option, convey, mortgage, create a security interest in, or otherwise dispose of any of the assets or operations of the corporation doing business as a hospital or any of the assets or operations of a related organization if the transaction or agreement will result in any for profit organization owning or controlling fifty percent or more of the assets or operations of the corporation doing business as a hospital or fifty percent or more of the assets or operations of a related organization~~ Transfer control, responsibility, or governance of fifty percent or more of the assets or operations of the nonprofit corporation to a for-profit corporation or entity or another nonprofit corporation or entity; or
  - c. Result in any for-profit ~~organization~~ corporation or entity or another nonprofit corporation or entity having control of, governance of, or the power to direct management and policies of the nonprofit corporation ~~doing business as~~ operating or controlling a hospital, nursing home, or a related organization.
2. The substitution of a new corporate member that transfers the control of, responsibility for, or governance of the nonprofit corporation, the substitution of a member of the governing body, or any arrangement,

written or oral, that would transfer voting control of the entity, is a transfer for purposes of this section.

3. This section applies to a foreign nonprofit corporation that operates or controls a hospital or nursing home within this state.
4. This section does not apply to the following transactions:
  - a. An action involving the enforcement or foreclosure of a security interest, lien, mortgage, judgment, or other creditor rights.
  - b. Agreements or transactions in the usual and regular course of the nonprofit corporation's business and activities.
5. The notice must be provided to the attorney general not less than ninety days before the closing date of the proposed agreement or transaction, and must include:
  - a. The names and addresses of the corporation doing business as a hospital, the for-profit organization, and all other parties to the proposed agreement or transaction;
  - b. The terms of the proposed agreement or transaction, including the proposed sale price;
  - c. A copy of the proposed agreement or transaction; and
  - d. Information regarding whether a Any financial or economic analysis by an expert or independent consultant has been prepared concerning the degree to which the proposed agreement or transaction will serve the public interest, or concerning the fair market value of the corporation doing business as a hospital retained by the nonprofit corporation which addresses the criteria set forth in section 10-33-145.
- ~~6.~~ 6. A nonprofit corporation doing business as a hospital or nursing home may neither transfer nor convey any assets or control through an agreement or transaction described in this section until ninety days after the corporation gives the attorney general notice required under this section, unless the attorney general waives all or part of the waiting period. Before the end of the waiting period, the attorney general may extend the period up to sixty additional days by providing written notice of the extension to the corporation. The waiting period may be extended for one or more additional sixty-day periods upon agreement between the corporation and the attorney general, or pursuant to a court order.
4. ~~The notice requirements of this section do not apply to a proposed agreement or transaction between related organizations serving the same or similar charitable purposes and are in addition to any notice requirements that may apply under section 10-33-122.~~

**SECTION 2. AMENDMENT.** Section 10-33-145 of the North Dakota Century Code is amended and reenacted as follows:

**10-33-145. Transaction by a nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home - Attorney general's powers and duties - Experts - Continuing appropriation.**

1. Upon receipt of a notice under section 10-33-144, the attorney general may review and investigate the proposed agreement or transaction and may

require the nonprofit corporation ~~doing business as~~ or entity operating or controlling a hospital or nursing home and the ~~for-profit organization~~ other parties to the agreement or transaction to provide to the attorney general any additional information relevant to the review or investigation of the proposed agreement or transaction.

2. Upon receipt of a notice under section 10-33-144, the attorney general may review the proposed agreement or transaction to determine whether consummation of the proposed agreement or transaction by the nonprofit corporation ~~doing business as~~ or entity operating or controlling a hospital or nursing home is consistent with the purposes of the nonprofit corporation or entity operating or controlling a hospital or nursing home and the fiduciary obligations of the ~~corporation doing business as a hospital and the obligations of the~~ officers and directors of the nonprofit corporation ~~doing business as~~ or entity operating or controlling a hospital or nursing home and is in accordance with law. The attorney general shall consider the following factors in reviewing and evaluating a proposed agreement or transaction:
  - a. Whether appropriate steps were taken by the nonprofit corporation ~~doing business as~~ or entity operating or controlling a hospital or nursing home to safeguard restricted assets transferred to the ~~for-profit organization~~ acquiring entity;
  - b. Whether appropriate steps were taken by the nonprofit corporation ~~doing business as~~ or entity operating or controlling a hospital or nursing home to ensure that any proceeds of the proposed agreement or transaction are used for charitable purposes consistent with restrictions placed on assets of and with the charitable purposes of the nonprofit corporation ~~doing business as~~ or entity operating or controlling a hospital or nursing home;
  - c. Whether the terms and conditions of the proposed agreement or transaction are fair and reasonable to the nonprofit corporation ~~doing business as~~ or entity operating or controlling a hospital or nursing home, including whether the nonprofit corporation ~~doing business as~~ or entity operating or controlling the hospital or nursing home will receive fair market value for the its assets of the corporation and, in a proposed agreement or transaction involving a nursing home, whether the proposed agreement or transaction constitutes a bona fide transaction;
  - d. Whether any conflict of interest or breach of fiduciary duty, as determined by the attorney general, exists and or was disclosed, including any conflict of interest or breach of fiduciary duty related to directors and officers of, executives of, and experts retained by the nonprofit corporation ~~doing business as~~ or entity operating or controlling a hospital, the ~~for-profit organization~~, or nursing home and any other party to the agreement or transaction; and
  - e. Whether the agreement or transaction will result in inurement, pecuniary gain, or excess benefit to any person associated with the nonprofit corporation ~~doing business as~~ or entity operating or controlling a hospital or nursing home or to any other person;
  - f. Whether the transaction is in the best interests of the nonprofit corporation or entity operating or controlling a hospital or nursing home; and

- g. Whether the transaction is authorized by the nonprofit corporation's governing documents.
3. For the purpose of reviewing and evaluating the factors identified in subsection 2, the attorney general may retain experts if necessary and reasonable and ~~shall~~ may obtain public comment regarding the proposed agreement or transaction. A contract entered by the attorney general with an expert under this section does not require a bid and is exempt from chapters 44-08 and 54-44.4. If the attorney general intends to seek payment from the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home for the cost of any expert retained under this subsection, at least five days before retaining that expert, the attorney general shall notify the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home of the expert cost projected to be incurred. A nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home which receives notice under this subsection shall pay the reasonable cost of any retained expert. If the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home objects to paying the costs of an expert, the corporation or entity may seek a district court order limiting the corporation's or entity's liability for the costs. In determining whether to issue an order, the court shall consider whether the expert is necessary and reasonable and the cost of the expert relative to the value of the proposed agreement or transaction.
4. Section 44-04-18.4 applies to any information provided to the attorney general under sections 10-33-144 through 10-33-147.
5. All costs, fees, and other moneys received under sections 10-33-144 through 10-33-149 must be deposited into the attorney general's operating fund. The moneys in the fund are appropriated to pay the costs incurred in the attorney general's performance of responsibilities pursuant to sections 10-33-144 through 10-33-149.

**SECTION 3. AMENDMENT.** Section 10-33-146 of the North Dakota Century Code is amended and reenacted as follows:

**10-33-146. Transaction by a nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home - Notice of decision - Public meeting - Meeting notice.** ~~Before the attorney general approves, denies, or takes any other action on a proposed agreement or transaction under section 10-33-144 or 10-33-145~~ Within ninety days of receipt of the written notice required under section 10-33-144, and such other additional extension of time permitted or provided under section 10-33-144, the attorney general shall notify, in writing, the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home of the attorney general's decision to approve, deny, or take any other action on the proposed agreement or transaction. Before issuing a written decision under this section, the attorney general ~~shall~~ may conduct ~~at least one~~ or more public ~~hearing~~ hearings, one of which must be held in the county where the ~~corporation doing business as a~~ hospital or nursing home is located. At a public hearing under this section, the attorney general shall request and receive comments from any interested person regarding the proposed agreement or transaction. At least fourteen days before a public hearing under this section, the attorney general shall provide notice of the meeting by publication in the official newspaper of the city in which the ~~corporation doing business as a~~ hospital or nursing home is located. The attorney general shall also provide notice of the meeting to the governing body of the county in which the ~~corporation doing business as a~~ hospital or nursing home is located, if applicable, and to the governing body of the city in which the ~~corporation doing business as a~~ hospital or nursing home is located, if applicable. Any party to the agreement may institute legal proceedings in the district court of the county in which the hospital or nursing home is

located to review the attorney general's decision. In a district court action brought under this section, the attorney general's decision is subject to de novo review by the court. In a proceeding under this section, the attorney general must be served with notice and is entitled to be heard. If the attorney general substantially prevails in a proceeding under this section, the attorney general is entitled to an award of attorney's fees, investigation fees, costs, and expenses of any investigation and proceeding under this section. The court shall award attorney's fees to the attorney general under this section based upon the hourly rates the attorney general charges to state agencies for the attorney general's legal services. A court may not apply the limitation on the rate of the attorney general's attorney's fees under this section as a limitation on an award of attorney's fees to the attorney general under any other section.

**SECTION 4. AMENDMENT.** Section 10-33-147 of the North Dakota Century Code is amended and reenacted as follows:

**10-33-147. Transaction by a nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home - Attorney general decision.** The attorney general may bring proceedings to secure compliance with section sections 10-33-144 through 10-33-149 in the district court of the county in which the hospital or nursing home is located. If the attorney general determines consummation of the proposed transaction or agreement is not consistent with the fiduciary obligations of the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home and the corporation's officers and directors, or is not in accordance with law, the attorney general may bring proceedings in the district court of the county in which the hospital or nursing home is located to enjoin the consummation of the proposed transaction or agreement or to secure any other relief available under the law. In a district court action brought under this section, the attorney general's decision is subject to de novo review by the court. If the attorney general substantially prevails in an action brought under this section, the attorney general is entitled to an award of attorney's fees, investigation fees, costs, and expenses of any investigation and action brought under this section. The court shall award attorney's fees to the attorney general under this section based upon the hourly rates the attorney general charges to state agencies for the attorney general's legal services. A court may not apply the limitation on the rate of the attorney general's attorney's fees under this section as a limitation on an award of attorney's fees to the attorney general under any other section. Failure of the attorney general to take action on a proposed agreement or transaction described in section sections 10-33-144 through 10-33-149 does not constitute approval of the transaction and does not prevent the attorney general from taking other action.

**SECTION 5.** Section 10-33-148 of the North Dakota Century Code is created and enacted as follows:

**10-33-148. Investigation - Subpoena - Hearing - Powers of the attorney general.** In discharging the attorney general's responsibilities under sections 10-33-144 through 10-33-149, and in connection with the public hearing provided for in section 10-33-146, the attorney general may conduct investigations, issue subpoenas to any person directly related to the proposed agreement or transaction, and conduct hearings in aid of an investigation or inquiry.

**SECTION 6.** Section 10-33-149 of the North Dakota Century Code is created and enacted as follows:

**10-33-149. Authority of the attorney general or a court is not impaired.** Sections 10-33-144 through 10-33-148 are in addition to, and do not supersede, any other authority of the attorney general established by statute, case law, or common law.

**SECTION 7.** A new subsection to section 50-24.4-15 of the North Dakota Century Code is created and enacted as follows:

Recognize any mandated costs, fees, or other moneys paid to the attorney general through transactions under sections 10-33-144 through 10-33-149."

Renumber accordingly