

SELLING YOUR NONPROFIT NURSING HOME? NEW YORK'S ATTORNEY GENERAL DETAILS CONCERNS ABOUT SALES OF NONPROFIT NURSING HOMES

Several states require that any sale of charitable assets must be reviewed by the attorney general to assess whether the sale is for fair consideration and in the best interests of charitable beneficiaries. The New York Attorney General's Charities Bureau ("Charities Bureau") is responsible for supervising charitable organizations to protect donors and beneficiaries of those charities from unscrupulous practices in the solicitation and management of charitable assets.

The Charities Bureau recently issued a [guidance memo](#) that focused on the sale of nonprofit nursing homes pursuant to New York's Not-for-Profit Corporation Law (the "Memo"). The Memo details the Charities Bureau's concerns that nonprofit nursing homes are not evaluating whether a sale or transfer and the intended use of the nursing home's assets will continue to promote the mission and purposes of the nonprofit nursing home.

Even if a facility is not in New York, a board should carefully review the concerns raised and best practices highlighted by the Charities Bureau when analyzing and carrying out the sale of a nonprofit nursing home.

The Charities Bureau is concerned that boards are not giving the proper effort and attention when evaluating whether the terms of the sale or transfer and the intended use of the proceeds will promote the mission and purposes of the nonprofit. Even if a transaction makes business sense for the organization, boards must explore and confirm that the community interests are served and how the transaction serves the nonprofit's underlying mission.

STATE OVERSIGHT OF NONPROFIT NURSING HOME ASSET SALES AND CHANGES OF OWNERSHIP

In New York, the Not-for-Profit Corporation Law requires the New York Attorney General and/or the New York Supreme Court to review the sale of substantially all the assets of nonprofits, including nursing homes. The procedure set forth in New York's laws is designed to preserve charitable assets to serve public purposes.

The review requires consideration and determination that the nonprofit nursing home has satisfied two factors:

- The consideration and the terms of the transaction are fair and reasonable to the selling nonprofit; and
- The purposes and mission of the nonprofit will be promoted along the way.

ATTORNEY GENERAL'S CONCERNS ABOUT THE SALE OF NONPROFIT NURSING HOMES

In the Memo, the Charities Bureau recognized that the decision by a board and management to sell a nonprofit nursing home to a for-profit entity is not taken lightly. The Memo's guidance is provided to assist both board and management in the exercise of their fiduciary responsibilities to charitable beneficiaries and to allow well-considered actions to proceed through the New York approval process.

The Charities Bureau expressed concern that the charitable programs of many nonprofit nursing homes do not continue after their sale. It recognized that ensuring that the proceeds of the sale are used to further the mission of the sold nursing home is challenging, but it found that many nonprofit nursing homes have not fully considered their responsibility to ensure that their use of the proceeds will promote the mission of the charity.

The Charities Bureau emphasized it has a significant concern about the effort and success by boards of nonprofit nursing homes and their advisors when evaluating whether the terms of the sale or transfer and the intended use of the proceeds will promote the mission and purposes of the charity. The Charities Bureau has had the "unfortunate experience" of approving petitions for sales of nursing homes that are shortly thereafter closed by the purchasers and sold or converted by the purchasers to condominiums or commercial developments.

ATTORNEY GENERAL'S GUIDANCE ON BEST PRACTICES

The Memo articulates recommended best practices for a board, its management and its advisors in considering the sale of a nonprofit nursing home, including:

- The factors to be evaluated in considering a sale;
- The business process for exploring requests for proposals and evaluating bidders;
- The protections to be provided for the class of charitable beneficiaries (that is, current and future residents) during and after the sale; and
- The use of proceeds of the sale consistent with the nursing home's charitable mission.

To prepare the facility to petition the Charities Bureau for approval of a sale, the Charities Bureau detailed best practices that a board should consider when entering into an agreement for sale by a nonprofit nursing home, especially a sale to a for-profit entity.

Planning

- Review a five-year projection of revenues and expenditures for the nursing home under current ownership.
- Explore (1) alternative or additional sources of funding to continue operations as a nonprofit nursing home; or (2) merger or affiliation with another nonprofit health care facility and the results of that evaluation.
- Solicit inquiries, bids or requests for proposals from potential purchasers, and what inquiries, bids or requests for proposals it received and considered.
- Examine the character, competence, integrity and ability to pay of potential purchasers, their owners, officers and directors

Continuation of Care

- Evaluate the ability and willingness of potential purchasers to provide quality services and protection from abuse or neglect to current and contemplated nursing home residents.
- Evaluate the ability and willingness of potential purchasers to ensure continued operation of the nursing home for current residents and the specific population served by the nursing home for a period of at least five years after the sale.

Financials and Agreement

- Obtain a statement of the fair value of the assets. The Charities Bureau expects that the statement of the "fair value of the assets" will reflect information and evaluation from an independent professional advisor with expertise in such evaluations.
- Include a statement of the amount of the corporation's debts and liabilities and how they are secured as of the date of the agreement of sale.

Use of Proceeds

- Board has a description and explanation of the proposed use of the proceeds for charitable purposes. In determining distribution of proceeds for charitable purposes, the board and management should be aware that sole members of charitable corporations are not entitled to appropriate charitable proceeds from the corporation of which they are sole member unless the directors of the entity make an independent determination that such distribution and its terms are consistent with the mission and charter of the selling charitable corporation.
- Review whether dissolution of the selling corporation is contemplated.

PRACTICAL TAKEAWAYS

Nonprofit nursing homes contemplating a sale of the facility should:

- Carefully review and detail that a potential sale of the facility is fair and reasonable to the selling nonprofit;
- Carefully review and detail that the purposes and mission of the nonprofit will be promoted along the way, including the use of the sales proceeds; and
- Review and implement the best practices listed above to prepare for a state-required review and approval of the potential sale.

If you have questions or would like additional information about this topic, please contact:

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