

**ATTORNEY GENERAL HEALTH FACILITY
TRANSACTION REGULATIONS**

§ 999.5. Attorney General Review of Proposals to Transfer Health Facilities under Corporations Code Sections 5914 et seq. and 5920 et seq.

(a) Written Notice to Attorney General of Proposed Transfer of Health Facility; Waiver of Notice.

(1) Any nonprofit corporation that is ~~subject to the public benefit corporation law defined in Corporations Code section 5046~~ and operates or controls a health facility or a facility that provides similar health care, shall provide written notice to, and obtain the written consent of, the Attorney General prior to entering into any agreement or transaction to do either of the following:

A. Sell, transfer, lease, exchange, option, convey, or otherwise dispose of its assets either to a for-profit corporation or entity or to ~~a mutual benefit~~ another nonprofit corporation or entity when a material amount of the assets of the ~~public benefit nonprofit~~ corporation are involved in the agreement or transaction.

B. Transfer control, responsibility, or governance of a material amount of the assets or operations of the nonprofit ~~public benefit~~ corporation either to any for-profit corporation or entity or to ~~any mutual benefit~~ another nonprofit corporation or entity.

~~(2) Any nonprofit corporation that is subject to the public benefit corporation law and operates or controls a health facility or a facility that provides similar health care, shall provide written notice to, and obtain the written consent of, the Attorney General prior to entering into any agreement or transaction to do either of the following:~~

~~_____ A. Sell, transfer, lease, exchange, option, convey, or otherwise dispose of its assets to another nonprofit public benefit corporation or entity when a material amount of the assets of the public benefit corporation are involved in the agreement or transaction.~~

~~_____ B. Transfer control, responsibility, or governance of a material amount of the assets or operations of the nonprofit public benefit corporation to another nonprofit public benefit corporation or entity.~~

~~(3)~~ (2) For purposes of section 999.5 of these regulations, an agreement or transaction involves a “material amount of the assets or operations” if either:

A. The agreement or transaction directly affects more than 20% of the value of the health facilities or facilities that provide similar health care that are operated or

controlled by the nonprofit corporation; or

B. The agreement or transaction involves the sale, transfer, exchange, change in control or governance of, or otherwise disposes of any health facility or facility that provides similar health care that is operated or controlled by the nonprofit corporation and that has a fair market value that exceeds \$3 million; or

C. The agreement or transaction involves the sale, transfer, exchange, change in control or governance of, or otherwise disposes of any general acute care hospital as defined in Health and Safety Code section 1250(a).

~~(4)~~ (3) For purposes of section 999.5 of these regulations, an agreement or transaction will “transfer control, responsibility, or governance” if:

A. There is a substitution of a new corporate member or members that transfers the control of, responsibility for, or governance of the nonprofit ~~public benefit~~ corporation; or

B. There is a substitution of one or more members of the governing body, or any arrangement, written or oral, that would transfer voting control of the members of the governing body.

~~(5)~~ (4) Written notice to, and the written ~~consent, of~~ consent of, the Attorney General shall not be required under section 999.5 of these regulations if the agreement or transaction is in the usual and regular course of the activities of the nonprofit ~~public benefit~~ corporation.

~~(6)~~ (5) Written notice to, and the written ~~consent, of~~ consent of, the Attorney General shall not be required under section 999.5 of these regulations if the Attorney General has given the nonprofit ~~public benefit~~ corporation a written waiver of the proposed agreement or transaction.

A. A corporation may request such a waiver by submitting, in writing, a description of the proposed agreement or transaction, a copy of all documents that effectuate any part of the proposed transaction, a description of the proposed use by the nonprofit corporation of any sales proceeds, and an explanation of why the waiver should be granted. a written request that complies with the provisions of sections 999.1(a) and 999.2(f) of these regulations. The Attorney General shall provide notice of a waiver request to any person who has previously requested such notice in writing.

B. The Attorney General shall grant or deny such request within thirty (30) days after all of the information needed to evaluate the waiver request has been submitted to the request is filed with the Attorney General. In determining whether to grant a waiver, the Attorney General shall consider whether any of the decisional factors set forth in

Corporations Code sections 5917 and 5923 are applicable to the proposed agreement or transaction. A waiver shall be denied if any of these decisional factors require full Attorney General review of the proposed agreement or transaction. The Attorney General may condition the grant of a waiver in a manner that eliminates the need for full Attorney General review.

C. Copies of the waiver request and the Attorney General's decision to grant or deny the waiver shall be made available to any person upon request, including any person who has previously requested such notice in writing.

~~(7)~~ (6) Sections 999.5(a)(1) and ~~999.5(a)(2)~~ of these regulations shall apply to any foreign nonprofit corporation that operates or controls a health facility or a facility that provides similar health care.

~~(8)~~ (7) ~~Section 999.5(a)(2)(1)~~ of these regulations shall not apply to any agreement or transaction described in Corporations Code section 5920 if, prior to the proposed agreement or transaction, the other party to the agreement or transaction is an "affiliate", "affiliate," as defined in Corporations Code § section 5031, of the transferring public benefit nonprofit corporation or entity, and the transferring corporation or entity provides the Attorney General with twenty (20) days' advance notice of the agreement or transaction. Such advance notice shall comply with the provisions of sections 999.1(a) and 999.2(f) of these regulations.

~~(9)~~ (8) Written notice to, and the written ~~consent, of consent of,~~ the Attorney General shall not be required under section 999.5 of these regulations unless the agreement or transaction involves a health facility or facility that provides similar care that is located within California.

~~(10)~~ (9) If a nonprofit ~~public benefit~~ corporation has engaged in multiple agreements or transactions, in a manner designed to avoid Attorney General review under section 999.5 of these regulations, all of the multiple agreements or transactions shall be considered and analyzed as a single transaction for any purpose under these regulations.

(b) Definitions

(1) "Applicant" means any corporation or entity that is required by sections 999.5(a)(1) or ~~999.5(a)(2)~~ of these regulations to submit written notice to the Attorney General.

(2) "Entity" means any form of business enterprise other than a corporation.

(3) The phrase "facility that provides similar health care" means any facility operated in California whose primary purpose is to provide medical services to patients requiring admission for more than 24 hours and that is otherwise similar in nature to the type of facilities defined in the provisions of Health and Safety Code section 1250.

(4) "Health facility" means any facility located in California that satisfies the

definition of health facility set forth in section 1250 of the Health & and Safety Code.

(5) "Potential transferee" means any corporation or entity with which an applicant has engaged in discussions, or from which an applicant has received a written proposal, concerning a possible agreement or transaction for which written notice is required by sections 999.5(a)(1) ~~and 999.5(a)(2)~~ of these regulations if such discussions or written proposal occurred within the twelve (12) months preceding the decision to transfer assets or control to a transferee.

(6) "Transferee" means any corporation or entity that is the recipient of assets or control through any transaction or agreement for which written notice to the Attorney General is required by sections 999.5(a)(1) ~~or 999.5(a)(2)~~ of these regulations.

(c) Notice and Availability of Information

(1) The ~~Applicant~~ applicant shall submit five copies of the notice to the Attorney General to any location set forth in section 999.1(a) of these regulations. The notice shall contain the information required by section 999.5(d) of these regulations and such additional information that the ~~Applicant~~ applicant believes is necessary for the Attorney General to review.

(2) The Attorney General may request an applicant to provide such additional information as the Attorney General deems reasonably necessary to decide whether to consent to, give conditional consent to or not to consent to a proposed agreement or transaction under Corporations Code sections 5915 and 5921. As set forth in Corporations Code sections 5917(g) and 5923(d), failure to provide the Attorney General with sufficient information and data to evaluate adequately the proposed agreement or transaction or the effects thereof on the public may be grounds for denying consent.

(3) All of the information provided to the Attorney General by the applicant shall be treated as a public record unless such information is a trade secret or unless the public interest in maintaining the confidentiality of that information clearly outweighs the public interest in disclosure.

(A) The applicant shall have the sole burden of designating, at the time of its submission, any specific information that it believes should be treated as confidential and the reasons therefor. The Attorney General shall determine the validity of the confidentiality claim and communicate that determination to the ~~Applicant~~ applicant prior to any public disclosure of the information.

(B) The public disclosure provisions of section 999.5(c)(4) of these regulations shall not apply to information determined to be confidential.

(C) If the applicant designates any of the information in the notice as confidential, five additional copies of the notice shall be submitted to the Attorney General with

the confidential information identified and redacted.

(4) Every applicant shall maintain a copy of the notice and any additional information submitted by the applicant to the Attorney General in an appropriate reading room in the community being affected by the agreement or transaction for review by the public during normal business hours. The applicant shall publicize the location at which the documents are available for review. Upon written request, the Attorney General shall make available without cost the notice and any additional information provided to the Attorney General to members of the public in written form as soon as practicable after its receipt.

(5) The applicant shall provide to the Attorney General a CD-ROM in PDF format containing the information submitted to the Attorney General under section 999.5(c)(1) and (c)(2) of these regulations. The CD-ROM shall not include any information designated as confidential or any signatures appearing on documents.

(d) Contents of Notice

(1) The written notice of any proposed agreement or transaction set forth in section 999.5(a)(1) ~~and (a)(2)~~ of these regulations shall include a section entitled “Description of the Transaction” that contains the following information:

(A) A full description of the proposed agreement and transaction.

(B) A complete copy of all proposed written agreements or contracts to be entered into by the applicant and the transferee that relate to or effectuate any part of the proposed transaction.

(C) A statement of all of the reasons the ~~Board of Directors~~ board of directors of applicant believes that the proposed agreement or transaction is either necessary or desirable.

(2) The written notice of any proposed agreement or transaction set forth in section 999.5(a)(1) of these regulations (~~transfers to for-profit entities~~) shall include a section entitled “Fair Market Value” that contains the following information:

(A) The estimated market value of all cash, property, stock, notes, assumption or forgiveness of debt, and any other thing of value that the applicant would receive for each health facility covered by the proposed agreement or transaction.

(B) The estimated market value of each health facility or other asset to be sold or transferred by the applicant under the proposed agreement or transaction.

(C) A description of the methods used by the applicant to determine the market value of any assets involved in the proposed agreement or transaction. This description

shall include a description of the efforts made by the applicant to sell or transfer each health facility that is the subject of the proposed agreement or transaction.

(D) Reports, analysis, Requests for Proposal, and any other documents that refer or relate to the valuation of any asset involved in the agreement or transaction.

(E) For joint venture transactions, all asset contribution agreements and related valuations, all limited liability corporation or limited liability partnership operating agreements, management contracts, and put option agreements.

(3) The written notice of any proposed agreement or transaction set forth in section 999.5(a)(1) ~~and (a)(2)~~ of these regulations shall include a section entitled “Inurement and Self-Dealing” that contains the following information:

(A) Copies of any documents or writings of any kind that relate or refer to any personal financial benefit that a proposed affiliation between applicant and the transferee would confer on any officer, director, employee, doctor, medical group or other entity affiliated with applicant or any family member of any such person as identified in Corporations Code section 5227(b)(2).

(B) The identity of each and every officer, trustee or director of applicant (or any family member of such persons as identified in Corporations Code section 5227(b)(2)) or any affiliate of applicant who or which has any personal financial interest in any company, firm, partnership, or business entity (other than salary and directors/trustees' fees) currently doing business with applicant, any affiliate of applicant, or the transferee or any affiliate of the transferee.

(C) A statement describing how the boards of directors of the nonprofit corporations involved in the transaction is ~~are~~ complying with the provisions of Health and Safety Code sections 1260 and 1260.1.

(4) The written notice of any proposed agreement or transaction set forth in section 999.5(a)(1) ~~and (a)(2)~~ of these regulations that will result in the nonprofit ~~public benefit~~ corporation receiving sales proceeds shall include a section entitled “Charitable Use of Assets” that contains the following information:

(A) The applicant’s ~~articles of incorporation~~ Articles of Incorporation and all amendments thereto and current ~~By-Laws~~ bylaws, any charitable trust restrictions, and any other information necessary to define the charitable trust purpose of the applicant’s assets.

(B) ~~Applicants'~~ Applicant's plan for use of the net proceeds after the close of the proposed transaction together with a statement explaining how the proposed plan is as consistent as possible with existing charitable purposes and complies with all applicable charitable trusts that govern use of applicant's assets. The plan must include any proposed amendments to the ~~Articles of Incorporation or Bylaws~~ articles of incorporation or bylaws of the

applicant or any entity related to the applicant that will control any of the proceeds from the proposed transfer.

(5) The written notice of any proposed agreement or transaction set forth in section 999.5(a)(1) ~~and (a)(2)~~ of these regulations shall include a section entitled "Impacts on Health Care Services" that contains the following information:

(A) A copy of the two most recent "community needs assessments" prepared by applicant for any health facility that is the subject of the agreement or transaction.

(B) A description of all charity care provided in the last five years by each health facility that is the subject of the agreement or transaction. This description shall include annual total charity care spending; inpatient, outpatient and emergency room charity care spending; a description of how the amount of charity care spending was calculated; annual charity care inpatient discharges, outpatient visits, and emergency visits; a description of the types of charity care services provided annually; and a description of the policies, procedures, and eligibility requirements for the provision of charity care.

(C) A description of all services provided by each health facility that is the subject of the agreement or transaction in the past five years to Medi-Cal patients, county indigent patients, and any other class of patients. This description shall include but not be limited to the type and volume of services provided, the payors for the services provided, the demographic characteristics of and zip code data for the patients served by the health facility, and the costs and revenues for ~~of~~ the services provided.

(D) A description of any community benefit program provided by the health facility during the past five years with an annual cost of at least \$10,000.

(E) For each health facility that is the subject of the agreement or transaction, ~~all existing staffing plans, policy and procedure manuals, employee handbooks and collective bargaining agreements or similar documents relating to a description of~~ current policies and procedures on staffing for patient care areas; employee input on health quality and staffing issues; and employee wages, salaries, benefits, working conditions and employment protections. Such description shall include a list of all existing staffing plans, policy and procedure manuals, employee handbooks, collective bargaining agreements or similar employment-related documents.

(F) For each health facility that is the subject of the agreement or transaction, all documents setting forth any guarantees made by any entity that would be taking over operation or control of the health facility relating to employee job security and retraining, or the continuation of current staffing levels and policies, employee wages, salaries, benefits, working conditions and employment protections.

(G) A statement describing all material effects that the proposed

agreement or transaction may have on delivery of health care services to the communities served by each facility proposed to be transferred, and a statement of how the proposed transaction will affect the availability and accessibility of health care in the affected communities.

(H) A description of each measure proposed by the applicant to mitigate or eliminate any significant adverse effect on the availability or accessibility of health care services to the affected community that may result from the agreement or transaction.

If any of the quantitative information required by subsections (B) and (C) is not available, the ~~Applicant~~ applicant shall so indicate and provide a reasonable estimate.

(6) The written notice of any proposed agreement or transaction set forth in section 999.5(a)(1) ~~and (a)(2)~~ of these regulations shall include a section entitled “Possible Effect on Competition” that contains the following information:

(A) For any agreement or transaction for which a Premerger Notification and Report Form is required to be submitted to the Federal Trade Commission under the Hart-Scott-Rodino Antitrust Improvement Act of 1976, a brief analysis of the possible effect of any proposed merger or acquisition of each health care facility that is the subject of the agreement or transaction on competition and market share in any relevant product or geographic market.

(B) The applicant shall provide the Premerger Notification and Report Form and any attachments thereto as filed with the Federal Trade Commission pursuant to the Hart-Scott-Rodino Antitrust Improvement Act of 1976 and 16 C.F.R. Parts 801-803. The procedure for designating information as confidential set forth in section 999.5(c)(3) of these regulations shall apply to any information submitted under this subsection.

(7) The written notice of any proposed agreement or transaction set forth in section 999.5(a)(1) ~~and (a)(2)~~ of these regulations shall include a section entitled “Other Public Interest Factors” that contains any other information the applicant believes the Attorney General should consider in deciding whether the proposed agreement or transaction is in the public interest.

(8) The written notice of any proposed agreement or transaction set forth in sections 999.5(a)(1) ~~and (a)(2)~~ shall include a resolution of the ~~Board of Directors~~ board of directors of the applicant authorizing the filing of the written notice and a statement by the ~~Chair~~ chair of the ~~Board~~ board that the contents of the written notice are true, accurate and complete.

(9) The written notice of any proposed agreement or transaction set forth in sections 999.5(a)(1) ~~and (a)(2)~~ shall include a list of the officers and directors of the transferee and the most recent audited financial statement for the transferee.

(10) The written notice of any proposed agreement or transaction set forth in sections 999.5(a)(1) ~~and (a)(2)~~ shall include a description of the ~~Applicant's~~ applicant's efforts to inform local governmental entities, professional staff and employees of the health facility, and the general public of the proposed transaction. This description shall include any comments or reaction to this effort .

(11) The written notice of any proposed agreement or transaction set forth in section 999.5(a)(1) ~~and (a)(2)~~ of these regulations shall include the following attachments if they are available and if they are not included in another section of the written notice:

(A) Any board minutes or other documents relating or referring to consideration by the ~~Board of Directors~~ board of directors of the applicant and any related entity, or any committee thereof of the agreement or transaction or of any other possible transaction involving any of the health facilities that are the subject of agreement or transaction.

(B) Copies of all documents relating or referring to the reasons why any potential transferee was excluded from further consideration as a potential transferee for any of the health facilities that are the subject of the agreement or transaction.

(C) Copies of all Requests for Proposal sent to any potential transferee, and all responses received thereto.

(D) All documents reflecting the deliberative process used by the applicant and any related entity in selecting the transferee as the entity to participate in the proposed agreement or transaction.

(E) Copies of each Proposal received by the applicant from any potential transferee suggesting the terms of a potential transfer of applicant's health facilities, and any analysis of each such Proposal.

(F) The applicant's prior two annual audited financial statements, the applicant's most current unaudited financial statement, business projection data and current capital asset valuation data.

(G) Any requests for opinions to the Internal Revenue Service for rulings attendant to this transaction and any Internal Revenue Service responses thereto.

(H) Pro forma post-transaction balance sheet for the surviving or successor ~~non-profit~~ nonprofit corporation.

(e) Procedure for Review of Notice

(1) Within 60 days of receipt of the notice as set forth in section 999.5(c)(1) of these Regulations, the Attorney General shall notify the applicant in writing of its decision to consent to, give conditional consent to, or not consent to the agreement or transaction. A copy of the written decision shall be made available to any person or entity who has requested a copy.

(A) For purposes of this section, the notice shall be deemed received on the date when substantially all of the information required by section 999.5(d) of these regulations has been submitted to the Attorney General.

(B) If an independent health care impact statement is required for the agreement or transaction under section 999.5(e)(5), the notice shall not be deemed received until all of the information required by section 999.5(d)(5) has been submitted to the Attorney General.

(2) The Attorney General may extend the ~~60-day~~ 60-day deadline for a decision by an additional 45-day period for the reasons set forth in Corporations Code sections 5915 and 5921. Nothing in this section shall preclude the Attorney General and the applicant from mutually agreeing to a further extension of the deadline.

(3) Prior to issuing a written decision, the Attorney General shall conduct one or more public meetings on the proposed agreement and transaction to receive comments from interested parties. At least one of the public meetings shall be in the county in which any health or similar facility that is affected by the agreement or transaction is located.

(A) At least 14 days prior to the public meeting, the Attorney General shall provide notice of the time and place of the meeting to the board of supervisors of the affected county, to any person who has requested such notice in writing, and through publication in a newspaper of general circulation in the affected community.

(B) Nothing in this section shall preclude the Attorney General from holding additional public meetings as necessary to ensure full consideration of the proposed agreement or transaction. Nothing in this section shall preclude the applicant or any other party from holding public meetings to discuss the proposed agreement or transaction.

(C) If a substantive change in the proposed agreement or transaction is submitted to the Attorney General after the initial public meeting, the Attorney General shall conduct an additional public meeting if it is deemed necessary to ensure adequate public comment regarding the proposed change.

(D) If an independent health care impact statement is prepared for the agreement or transaction under section 999.5(e)(5), a public meeting shall be held no earlier than 10 days after the completed statement has been made available for public review.

(4) Within the time periods set forth in this section and relating to the factors set forth in section 999.5(f), the Attorney General may contract with experts or consultants to review any aspect of the proposed agreement or transaction or receive information or expert opinion from any state agency. The Attorney General shall make publicly available any written report from any such expert, consultant, or state agency.

(5) The Attorney General shall prepare an independent health care impact statement for any agreement or transaction that satisfies either of the following conditions:

(A) The agreement or transaction directly affects a general acute care hospital as defined in Health and Safety Code section 1250(a) that has more than 50 acute care beds; ~~and~~ or

(B) There is a fair argument that the agreement or transaction may result in a significant effect on the availability or accessibility of existing health care services.

Nothing in this section shall preclude the Attorney General from preparing an independent health care impact statement or any other report that may be necessary for a complete review and evaluation of the agreement or transaction.

(6) The independent health care impact statement shall contain the following information:

(A) An assessment of the effect of the agreement or transaction on emergency services, reproductive health services and any other health care services that the hospital is providing.

(B) An assessment of the effect of the agreement or transaction on the level and type of charity care that the hospital has historically provided.

(C) An assessment of the effect of the agreement or transaction on the provision of health care services to Medi-Cal patients, county indigent patients, and any other class of patients.

(D) An assessment of the effect of the agreement or transaction on any significant community benefit program that the hospital has historically funded or operated.

(E) An assessment of the effect of the agreement or transaction on staffing for patient care areas as it may affect availability of care, on the likely retention of employees as it may affect continuity of care, and on the rights of employees to provide input on health quality and staffing issues.

(F) An assessment of the effectiveness of any mitigation measure proposed by the Applicant applicant to reduce any significant adverse effect on health care

services identified in the impact statement.

(G) A discussion of alternatives to the proposed agreement or transaction including closure of the hospital.

(H) Recommendations for additional feasible mitigation measures that would reduce or eliminate any significant adverse effect on health care services identified in the impact statement.

The information contained in the independent health care impact statement shall be used in considering whether the agreement or transaction may create a significant effect on the availability or accessibility of health care services as set forth in section 999.5(f)(8) of the regulations. Copies of the health care impact statement shall be made available to any person or entity that has requested a copy.

(7) It is the policy of the Attorney General to receive and consider all relevant information concerning the proposed agreement or transaction. Any interested person may submit written comments, or electronic mail if feasible, regarding any aspect of the proposed agreement or transaction. The written comments shall be addressed to the Attorney General, Charitable Trusts Section, 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, Attn: Hospital Conversion. ~~Unless the deadline has been extended as provided in section 999.5(c)(2) of these regulations, written~~ Written comments should be submitted no later than ~~45 days after the date of the filing of the notice~~ 10 days before the applicable deadline for the decision.

(f) Factors To Be Considered in Making a Decision

(1) In making ~~its~~ a determination on whether to consent to any agreement or transaction for which written consent is required by section 999.5(a)(1) of these regulations, the Attorney General shall consider whether the terms and conditions of the agreement or transaction are fair and reasonable to the selling nonprofit ~~public benefit~~ corporation.

(2) In making ~~its~~ a determination on whether to consent to any agreement or transaction for which written consent is required by sections 999.5(a)(1) ~~and (a)(2)~~ of these regulations, the Attorney General shall consider whether the agreement or transaction will result in inurement to any private person or entity.

(A) As used in this subsection, “inurement” means that an individual or entity has received some special benefit which is unreasonable under the circumstances because

of his, her or its relationship to any nonprofit corporation involved in the transaction. “Inurement” also includes excessive compensation to directors, officers or employees of any nonprofit corporation involved in the transaction.

(B) In determining whether the agreement or transaction will result in inurement, the Attorney General shall assess, among other things, whether any officer, director, employee, or spouse or family member as described in Corporations Code section 5227(b)(2) of an officer or director of any nonprofit corporation involved in the agreement or transaction will receive stock options, performance bonuses, increased compensation, excessive salaries and benefits, or corporate loans as a result of the agreement or transaction.

(C) An agreement or transaction will result in inurement if there is a violation of Health and Safety Code sections 1260 and 1260.1.

(3) In making ~~its a~~ determination on whether to consent to any agreement or transaction for which written consent is required by section 999.5(a)(1) of these regulations, the Attorney General shall consider ~~whether the agreement or transaction is at~~ the fair market value of the agreement or transaction as that the term “fair market value” is defined in Corporations Code sections 5917(c) and 5923(c).

(A) The Attorney General may review some or all of the following factors to determine ~~whether the agreement or transaction is at~~ fair market value of the agreement or transaction:

1. The fair market value of tangible and intangible assets proposed to be sold or transferred by the applicant involved in the transaction;

2. Anticipated future earnings or other income from the facilities and other assets being sold or transferred;

3. The fair market value of tangible and intangible assets proposed to be received by the applicant in the transaction ~~If the nonprofit corporation is receiving stock rather than cash for the sale or transfer of a health facility or other assets, such factors as future dilution of interest through the issuance of stock options or other means, lack of liquidity or other legal or practical limitations on the sale or transfer of the stock, lack of control through the holding or of a minority interest or non-voting stock and adverse tax consequences may be evaluated in determining the value of the stock;~~

4. If the nonprofit corporation is receiving notes rather than cash for the sale or transfer of a health facility or other assets, such factors as the type and value of any security or collateral, the present value of the note, the marketability of the note, and tax consequences may be evaluated in determining the value of the note;

5. Whether the facilities or assets being sold or transferred have been

aggressively marketed by investment bankers or other relevant professionals in an attempt to generate multiple bidders and maximum value;

6. Whether there are competing offers;

7. Whether formal and professional valuation appraisals have been obtained; ~~and~~

8. Whether the ~~non-profit~~ nonprofit corporation thoroughly considered all realistic alternatives, including mergers and/or strategic alliances with other ~~non-profit~~ nonprofit entities = (both locally and regionally based) and transaction alternatives (e.g., sales of assets, leases, joint ventures, etc.) with for-profit partners; and

9. If an applicant has filed for protection under the United States Bankruptcy Code, the extent to which the bankruptcy court proceeding will set a fair market value for the assets involved in the transaction.

(B) If written notice and consent is required by the provisions of Corporations Code section 5914, the Attorney General shall also consider whether the agreement or transaction is at fair market value. This requirement shall not apply if the written notice and consent is required by the provisions of Corporations Code section 5920.

(4) In making its a determination on whether to consent to any agreement or transaction for which written consent is required by section 999.5(a)(1) of these regulations, the Attorney General shall consider whether the market value has been manipulated by the parties to the agreement or transaction in a manner that causes the value of the assets to decrease.

(5) In making its a determination on whether to consent to any agreement or transaction for which written consent is required by sections 999.5(a)(1) ~~and (a)(2)~~ of these regulations, the Attorney General shall consider whether the proposed use of the proceeds from the agreement or transaction is consistent with the charitable trust on which the assets are held by the health facility or affiliated nonprofit health system.

(A) If the agreement or transaction involves the sale of any charitable trust assets, the nonprofit corporation that receives the sale proceeds shall utilize those proceeds for a like charitable purpose benefitting the same class of beneficiaries. If the charitable trust assets that are sold or transferred involve restricted funds, the proceeds received shall remain segregated and used for their restricted purposes.

(B) If the agreement or transaction will result in a redirection of charitable trust assets from an operational use to a grant-making use, every effort shall be made to insure

that a constancy of purpose is maintained. A court-validating procedure will be required for any transaction described in this subsection.

(6) In making ~~its~~ a determination on whether to consent to any agreement or transaction for which written consent is required by sections 999.5(a)(1) ~~and (a)(2)~~ of these regulations, the Attorney General shall consider whether the agreement or transaction involves or constitutes any breach of trust.

(7) In making ~~its~~ a determination on whether to consent to any agreement or transaction for which written consent is required by sections 999.5(a)(1) ~~and (a)(2)~~ of these regulations, the Attorney General shall consider whether sufficient information and data has been provided by the applicant to evaluate adequately the agreement or transaction or the effects thereof on the public.

(8) In making ~~its~~ a determination on whether to consent to any agreement or transaction for which written consent is required by sections 999.5(a)(1) ~~and (a)(2)~~ of these regulations, the Attorney General shall consider whether the agreement or transaction may create a significant effect on the availability or accessibility of health care services to the affected community.

(A) Potential adverse effects on availability or accessibility of health care may ~~properly be addressed~~ mitigated ~~either through provisions negotiated between the non-profit corporation and the for-profit corporation parties to the transaction, (e.g., guaranteed levels of uncompensated care, guaranteed retention of specific services including emergency room services, etc.) or through the imposition of trust restrictions placed on the non-profit non-profit corporation's use of the transaction proceeds.~~ through conditions adopted by the Attorney General in consenting to the proposed transaction, or through any other appropriate means.

(B) It is the policy of the Attorney General, in consenting to an agreement or transaction involving a general acute care hospital, to require for a period of at least five years that a minimum level of annual charity care costs be incurred by the hospitals that are the subject of the agreement or transaction. The minimum level of annual charity care costs should be based on the historic level of charity care that the hospital has provided. The definition and methodology for calculating charity care costs should be consistent with the definitions and methodology established by the Office of Statewide Health Planning and Development. The Attorney General shall retain complete discretion to determine whether this policy shall be applied in any specific transaction under review.

(C) It is the policy of the Attorney General, in consenting to an agreement or transaction involving a general acute care hospital, to require for a period of at least five years the continuation at the hospital of existing levels of essential healthcare services, including but not limited to emergency room services. The Attorney General shall retain complete discretion to determine whether this policy shall be applied in any specific transaction under review.

(9) In making ~~its~~ a determination on whether to consent to any agreement or transaction for which written consent is required by sections 999.5(a)(1) ~~and (a)(2)~~ of these regulations, the Attorney General shall consider whether the effect of the agreement or transaction may be substantially to lessen competition or tend to create a monopoly.

(10) In making ~~its~~ a determination on whether to consent to any agreement or transaction for which written consent is required by sections 999.5(a)(1) of these regulations, the Attorney General shall consider the extent of independence that the nonprofit corporation retains as a result of the agreement or transaction.

(A) The Attorney General will closely scrutinize any agreement or transaction in which the sale proceeds to the nonprofit corporation are tied to the provision of services by the acquiring for-profit entity such as providing health services to the poor in lieu of cash or guaranteed payments by the nonprofit corporation to the acquiring entity for indigent services.

(B) Acquiring for-profit entities shall not control sale proceeds or assets through such methods as creation of a new nonprofit foundation or through appointments to the board of directors of the nonprofit corporations.

(11) Except for transactions set forth in Corporations Code section 5233(b), the Attorney General shall not consent to any agreement or transaction to which one or more directors of any nonprofit corporation involved in the agreement or transaction has a material financial interest unless the facts set forth in Corporations Code section 5233(d)(2) or (d)(3) are established.

(12) In making ~~its~~ a determination on whether to consent to any agreement or transaction for which written consent is required by sections 999.5(a)(1) ~~and (a)(2)~~ of these regulations, the Attorney General shall consider whether the agreement or transaction is in the public interest.

(13) As provided by Corporations Code section 5917.5, the Attorney General shall not consent to any agreement or transaction in which the seller restricts the type or level of medical services that may be provided at the health facility that is the subject of the agreement or transaction.

(g) Compliance Program

(1) The Attorney General shall monitor compliance with any terms or conditions of any agreement or transaction for which the Attorney General has given written consent or conditional consent under Corporations Code sections 5915 and 5921. Upon request of the Attorney General, parties to any such agreement or transaction shall provide to the Attorney General such information as is reasonably necessary to monitor compliance.

(2) The Attorney General may contract with experts and consultants as reasonable

and necessary to review and evaluate compliance as provided in section 999.5(g)(1) of these regulations. ~~The selling nonprofit public benefit corporation shall reimburse the Attorney General for all contract costs.~~

(3) For any agreement or transaction for which the Attorney General has given written consent or conditional consent under Corporations Code section 5915, the Attorney General shall be entitled to reimbursement of all actual, reasonable and direct costs, including contract and administrative costs, incurred in monitoring compliance as provided in section 999.5(g)(1) of these regulations. ~~Such reimbursement shall be provided by the selling nonprofit public benefit corporation.~~

(4) For any agreement or transaction for which the Attorney General has given written consent or conditional consent under Corporations Code section 5921 and for a period not to exceed two years after the end of the time period for performance of any obligation specified by the agreement or transaction, the Attorney General shall be entitled to reimbursement of all actual, reasonable and direct costs, including contract and administrative costs, incurred in monitoring compliance as provided in section 999.5(g)(1) of these regulations. ~~Such reimbursement shall be provided by the selling nonprofit public benefit corporation.~~

(5) Except as otherwise prohibited by law or as necessary to protect privileged communications, the Attorney General shall make available to the public all documents relating to compliance with any terms or conditions of any agreement or transaction for which the Attorney General has given consent or conditional consent under Corporations Code section 5915 and 5921.

(h) Amendment of Consent Terms and Conditions

(1) Either the selling or acquiring corporation or entity, or their successors in interest, may request Attorney General approval of any amendment of the terms and conditions of any agreement or transaction for which the Attorney General has given consent or conditional consent under Corporations Code section 5915 or 5921. The sole basis for such a request shall be a change in circumstances that could not have reasonably been foreseen at the time of the Attorney General's action.

(2) A request for an amendment shall include a description of each proposed amendment, a description of the change in circumstance requiring each such amendment, a description of how each such amendment is consistent with the Attorney General's consent or conditional consent to the transaction, and a description of the efforts of the entity making the request to avoid the need for amendment.

(3) The Attorney General shall issue a decision on the proposed amendments within 90 days of the submission of all of the information set forth in section 999.5(h)(2) of these regulations. The Attorney General shall provide public notice of the proposed amendments. A public meeting shall be held before the decision is made either at the discretion of the Attorney

General or upon the request of any person within 7 days of the public notice.

(4) In approving proposed amendments to conditions relating to the operation of a health facility such as required levels of charity care and continuation of essential services, the Attorney General shall consider the effect of the proposed amendments on the availability or accessibility of health care services to the affected community. The Attorney General shall approve proposed amendments of the use of sales proceeds only if the proposed amendments are necessary to carry out charitable trust purposes, or in the case of a proposed change in charitable purpose only if that change complies with the principles of the *cy pres* doctrine.

(5) The provisions of section 999.5(g)(2), (3), (4) and (5) shall apply to Attorney General review of proposed amendments of the terms and conditions of any agreement or transaction for which the Attorney General has given consent or conditional consent under Corporations Code section 5915 and 5921.

(6) Unless otherwise provided in the decision consenting to an agreement or transaction, the approval of the Attorney General shall not be required for modifications to the agreement or transaction that are not material to the Attorney General's consent. The provisions of section 999.5(h) shall not limit the authority of the Attorney General to interpret the terms and conditions of any consent decision.

(hi) Attorney General Cost Reimbursements

(1) The applicant shall reimburse the Attorney General for the following costs incurred in the review and evaluation of any written notice submitted under section 999.5(a) of these regulations:

(A) All actual contract costs that are reasonable and necessary to conduct the review and evaluation, and

(B) All actual, reasonable, direct costs, including administrative costs, incurred in reviewing, evaluating, and ruling upon the written notice.

(2) The Attorney General shall also be entitled to reimbursement for the costs set forth in sections 999.5(g)(2), (3) and (4) and section 999.5(h)(5) of these regulations. Such reimbursement shall be provided by either the selling or the acquiring corporation, depending upon which one the burden of compliance falls or which one submitted the proposed amendment.

(3) As used in sections 999.5(g)(3) and (4) and 999.5(hi)(1)(B) of these regulations, "actual, reasonable and administrative costs" includes, but ~~are~~ is not limited to, the cost for all Attorney General's office personnel and employee time at the billing rates used by the Department of Justice for budgeting purposes, costs of travel, printing costs, and all costs incurred in the noticing and conduct of public meetings.

(4) The Attorney General shall maintain an adequate record of any reimbursable costs, ~~that~~ which shall, upon request, be made available to the party from whom reimbursement is being sought.

Note: Authority: Corporations Code sections 5914(b), 5918, 5920(b), 5924(d) and 5925.

Reference: Corporations Code sections 5914 through 5925