SPONSOR: Sen. Mantzavinos & Rep. K. Johnson
Sen. Hoffner; Reps. Burns, Romer, Ross Levin

DELAWARE STATE SENATE
153rd GENERAL ASSEMBLY

SENATE BILL NO. 313
AS AMENDED BY
SENATE AMENDMENT NO. 1

AN ACT TO AMEND TITLES 16 AND 29 OF THE DELAWARE CODE RELATING TO THE PROTECTION OF NONPROFIT ACUTE CARE HOSPITALS.

WHEREAS, acute care hospitals are essential public resources that provide emergency, surgical, obstetric, and other life-sustaining services to Delaware residents; and

WHEREAS, the availability of acute care hospital services is critical to the health, safety, and welfare of all Delawareans, particularly those in rural and medically underserved communities; and

WHEREAS, Delaware's acute care hospitals include facilities serving populations that are disproportionately dependent on publicly funded programs; and

WHEREAS, the continued operation and financial stability of these hospitals is necessary to maintain access to emergency and essential medical services across the State; and

WHEREAS, the acquisition of acute care hospitals by entities owned or controlled by private equity firms, has been associated nationally with increased financial extraction, workforce reductions, service line eliminations, and, in some cases, hospital closure; and

WHEREAS, among the mechanisms used to extract value from acquired hospitals is the sale of hospital real estate to for-profit investment vehicles, such as real estate investment trusts, and the simultaneous leasing back of those properties; and

WHEREAS, such transactions convert hospital real estate from a charitable asset to a source of perpetual rental obligation, encumber facilities with lease burdens that survive bankruptcy, and leave communities without recourse when hospital operators subsequently fail; and

WHEREAS, private equity firms may seek to obtain influence over nonprofit acute care hospitals incrementally — including through the acquisition of minority ownership or membership interests, sub-majority governance rights, the right to appoint or approve executive officers, or the right to appoint or designate board members or observers — without completing a full conversion transaction; and

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WHEREAS, such incremental acquisition of interests and rights poses risks to the charitable mission and community accountability of nonprofit acute care hospitals equivalent to those posed by outright acquisition; and

WHEREAS, a moratorium on such transactions by private equity firms is necessary to allow the State time to develop permanent statutory safeguards appropriate to Delaware's healthcare market and the characteristics of its hospital systems.

NOW, THEREFORE:

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 2531, Chapter 25, Subchapter III, Title 29 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows and redesignating accordingly:

§ 2531. Definitions.

As used in this subchapter:

(1) "Not-for-profit healthcare conversion transaction" ~~includes:~~ includes any of the following, whether undertaken directly or indirectly through one or more affiliates:

a. The sale, transfer, lease, exchange, optioning, conveyance, affiliation, merger, joint venture, or other disposition of a material amount of the assets or operations of a not-for-profit healthcare entity, made other than in the normal course of business, to an entity or person other than a charity or not-for-profit entity;

b. The transfer of control or governance of a material amount of the assets or operations of a not-for-profit healthcare entity to an entity or person other than a charity or not-for-profit entity;

c. A substantial change or amendment to a certificate of incorporation which materially affects a not-for-profit healthcare entity's charitable or public benefit intent, or the disposition of reserves or control of a not-for-profit healthcare entity to an entity or a person other than a charity or not-for-profit entity;

d. A change in the composition of the Board of Directors such that, upon the effective date of such change, a majority of directors of the not-for-profit healthcare entity are affiliated with (or have been elected by directors a majority of whom were or are affiliated with) any single entity or person other than a charity or not-for-profit entity. For purposes of this paragraph, a director shall be deemed to be affiliated with such entity or person if such director:

1. Receives or has received, directly or indirectly, compensation, including income, in any form from such person or entity (or parent, subsidiary or affiliate of such entity);

2. Serves or has served as a director, officer, employee, partner, member or agent of such entity (or of a parent, subsidiary or affiliate of such entity);

3. Is a close family member of such person or is a close family member of any person who serves as an officer or director of such entity (or parent, subsidiary or affiliate of such entity); or

4. Is, directly or indirectly, controlled by such person or entity.

e. With respect to a nonprofit acute care hospital, the sale, transfer, conveyance, or granting of a leasehold or other arrangement that transfers possession or operational control of primary facility real estate to an entity or person other than a charity or not-for-profit entity.

(2) "Not-for-profit healthcare entity" includes a not-for-profit hospital, including a corporation or a hospital created under a trust or will, a not-for-profit healthcare service provider, a not-for-profit nursing home or long term care facility, a not-for-profit healthcare insurer, a mutual corporation holding assets in charitable trust for the public benefit, an entity maintaining plans to provide healthcare services or indemnity thereof, and an entity, other than a for-profit entity, affiliated with any of these through ownership, governance, or membership, such as a holding company or subsidiary.

(3) "Not-for-profit healthcare insurer" includes a not-for-profit provider of healthcare insurance, including service associations, health service corporations, and physician service organizations or their affiliates.

(4) "Person" means an individual, partnership, trust, estate, corporation, association, organization, joint venture, joint stock company, limited liability company, or other legal or commercial entity.

(5) "Public benefit asset" means, as to a not-for-profit healthcare entity that is seeking to engage in a not-for-profit healthcare conversion transaction, that part of the fair market value of the converting entity impressed with a public trust for the public benefit as initially determined by the Attorney General and subject to the approval of the Court of Chancery.

( ) "Acute care hospital" means a hospital as defined in § 1001 of Title 16, excluding any facility that exclusively provides psychiatric services, rehabilitative services, or long-term care services.

( ) "Primary facility real estate" means the land and buildings in which a nonprofit acute care hospital's licensed inpatient and emergency services are located.

Section 2. Amend § 2532, Chapter 25, Subchapter III, Title 29 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2532. Notice to the Attorney General.

A not-for-profit health-care entity seeking to engage in a not-for-profit healthcare conversion transaction is required to provide written notice of its intent to enter into the transaction to the Attorney General of the State at least 180 days prior to the closing date of the proposed transaction. In the case of any notice required under this section that involves an acute care hospital, the not-for-profit health-care entity is required to simultaneously provide a copy of such notice to the Governor and to the Secretary of the Department of Health and Social Services.

Section 3. Amend Chapter 25, Subchapter III, Title 29 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2534. Moratorium on conversion transactions involving acute care hospitals.

(a) For purposes of this section, a "change of control transaction" means to acquire, directly, indirectly, or acting through 1 or more affiliates, the power to direct the management, policies, or clinical practices of a nonprofit acute care hospital, whether through ownership of voting securities, by effecting a change in the composition of the board of directors, by contract or otherwise.

(b) A person, other than a charity or not-for-profit entity, may not enter into a change of control transaction or a not-for-profit healthcare conversion transaction involving a nonprofit acute care hospital. A transaction that violates this subsection is void and of no legal effect.

(c) A change of control transaction is presumed if any of the following apply to a person or entity, directly, indirectly, or acting through 1 or more affiliates:

(1) The person or entity owns, controls, or holds with the power to vote, or holds proxies representing 25% or more of any class of voting securities or membership interests in the hospital or in any entity through which the hospital's licensed inpatient or emergency services are conducted.

(2) The person or entity has the contractual or governance right to appoint, remove, or approve one or more members of the hospital's board of directors or governing body, or one or more officers with executive authority over hospital operations, finances, or clinical services.

(3) The person or entity has the contractual right to withhold consent or exercise a veto over material operational, financial, or strategic decisions of the hospital, including changes in service lines, capital expenditures, or executive compensation.

(d) This section applies to a transaction that has not closed before [the effective date of this Act]. A transaction is closed when it is fully executed and effective.

(e) The Attorney General may seek injunctive relief and pursue any other remedy available under this subchapter or at common law to enforce this section. Any remedy available under this section is cumulative with, and not in substitution for, any other remedy available under this subchapter or any other provision of law.

(f) The expiration of this section does not limit any enforcement action commenced prior to the expiration.

Section 4. Amend § 9304, Chapter 93, Title 16 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 9304. Activities subject to review.

(a) Any person must obtain a Certificate of Public Review prior to undertaking any of the following activities:

(1) The construction, development or other establishment of a health-care facility or the acquisition of a nonprofit health-care facility;

(2) Any expenditure by or on behalf of a health-care facility in excess of $5,800,000, or some greater amount which has been designated by the Board following an annual adjustment for inflation using an annual inflation index determined by the United States Department of Labor, Bureau of Labor Statistics, is a capital expenditure. A capital expenditure for purposes of constructing, developing or otherwise establishing a medical office building shall not be subject to review under this chapter. When a person makes an acquisition by or on behalf of a health-care facility under lease or comparable arrangement, or through donation which would have required review if the acquisition had been by purchase, such acquisition shall be deemed a capital expenditure subject to review;

(3) A change in bed capacity of a health-care facility which increases the total number of beds (or distributes beds among various categories, or relocates such beds from 1 physical facility or site to another) by more than 10 beds or more than 10 percent of total licensed bed capacity, whichever is less, over a 2-year period;

(4) The acquisition of major medical equipment, whether or not by a health-care facility and whether or not the acquisition is through a capital expenditure, an operating expense or a donation. The replacement of major medical equipment with similar equipment shall not be subject to review under this chapter. In the case of major medical equipment acquired by an entity outside of Delaware, the use of that major medical equipment within Delaware, whether or not on a mobile basis, is subject to review under this chapter. Major medical equipment which is acquired for use in a freestanding acute inpatient rehabilitation hospital, as defined in § 9302(4) of this title, a dispensary or first aid station located within a business or industrial establishment maintained solely for the use of employees or in a first aid station, dispensary or infirmary offering services exclusively for use by students and employees of a school or university or by inmates and employees of a prison is not subject to review.

(b) A person, other than a charity or not-for-profit entity under § 2531 of Title 29, may not submit, and the Board may not accept, process, review, or act upon, an application for a Certificate of Public Review for the construction, development, establishment, or acquisition of an acute care hospital, as defined in § 2531 of Title 29. Any application submitted in violation of this subsection is void and of no legal effect.

Section 5. Sections 2 through 4 expire on July 1, 2028, unless terminated sooner or extended by the General Assembly.