

Focusing on Board and Management Duties, Guidance from NYS Attorney General Sets Roadmap for Sale of Not-for-Profit Nursing Homes

The Charities Bureau of the New York State Attorney General's Office has issued new guidance on requirements for the sale of not-for-profit nursing homes (the "Guidance Statement") under the New York State Not-for-Profit Corporation Law ("NPCL"). The Guidance Statement focuses squarely on the Attorney General's expectations for boards of directors ("Boards") and executive management as they consider, plan, and petition the Charities Bureau for approval to sell a not-for-profit nursing home. While targeted to the sale of nursing homes, the Guidance Statement sets forth standards and a process with broad implications for the sale of other not-for-profit provider entities.

NPCL Sections 511 and 511-A require the Attorney General, and/or the New York Supreme Court, to review sales where a not-for-profit sells "all or substantially all of its assets." That review requires a determination that: (1) the seller is receiving fair value for the sale without taking on excessive risk; and (2) the sale of the assets will promote the "mission and purposes of the charity." The Charities Bureau of the Attorney General's Office is charged to oversee the proposed sale of not-for-profit entities.

The Guidance Statement stresses that while most not-for-profit nursing homes have met the first requirement, it raises a concern that the Boards of many not-for-profit nursing homes have not been as diligent in satisfying the second requirement. As interpreted by the Charities Bureau, charitable mission under the NPCL imposes a responsibility on Boards for current and future residents of the nursing home. The Guidance Statement notes that the number of not-for-profit nursing homes sold to for-profit entities has increased, and that, in several instances, nursing homes sold to for-profit entities were closed shortly after the sale for commercial development. The Guidance Statement also recognizes that some nursing homes seeking to sell have been able to make an economic case that continued operation of an existing single facility will not be viable and that sale or transfer is appropriate.

The Charities Bureau specified best practices for a not-for-profit Board, along with the management team and professional advisors, to follow when considering the sale of a not-for-profit facility. As suggested by the Guidance Statement, the Charities Bureau is likely to scrutinize the following, among other areas:

- steps the Board took to continue operating as a not-for-profit, including whether it contemplated merging or affiliating with another not-for-profit;
- whether the Board solicited feedback from current residents and their family members about a proposed sale to a for-profit entity;
- whether and how the Board conducted its own review of the character and competence of the potential purchasers;
- whether and how the Board evaluated the ability of potential buyers to protect current and future nursing home residents from abuse;
- whether the Board was able to obtain a commitment from the buyer that the buyer would keep operating the nursing home for at least an additional five years; and
- whether and how the Board considered the levels of staffing and supervision for residents after the sale and whether it secured a commitment from the buyer to maintain appropriate staffing.

The Guidance Statement identifies the financial information that selling entities must provide to the Charities Bureau, including a statement of the fair value of the assets prepared by an independent professional advisor with expertise in such transactions. Sellers must also advise the Charities Bureau of how the proposed use of the assets of the sale will continue the organization's charitable mission.

The Guidance Statement stresses the importance of quality of care for nursing home residents, calling for an assessment of the willingness and capacity of the purchaser to deliver quality of care, the need for staff continuity and commitments to maintain quality and services after the closing, among other factors. While a character and competence review of the purchaser will be conducted by the Department of Health (which is in turn reviewable and subject to approval by the Public Health and Health Planning Council) in assessing the proposed sale, the Guidance Statement places responsibility squarely on sellers to undertake their own assessment.

Overall, the Charities Bureau expects that not-for-profit nursing home Boards will develop a clear plan and process to promote the "mission and purposes" of the entity. The Guidance Statement underscores that the Charity Bureau will continue to scrutinize carefully the proposed sale of a not-for-profit nursing home to a for-profit entity requiring Boards, executives and their professional advisors to anticipate and address the criteria set forth in the Guidance Statement.

Bond has assisted many clients with the sale of not-for-profit nursing homes and other entities to both for-profit and not-for-profit organizations, and has secured approvals from the Attorney General and Supreme Court in numerous transactions.

If you have any questions about the Guidance Statement, contact [Tracy E. Miller](#), Deputy Chair, Health & Long-Term Care Practice (tmiller@bsk.com) or [Logan C. Geen](#) (lgeen@bsk.com). If you are seeking legal assistance for the sale of a not-for-profit facility, contact any of the [attorneys](#) in our [Health Care Practice](#), or the attorney in the Firm with whom you are regularly in contact.



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