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SFA



BILL ANALYSIS

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Senate Bills 149 and 150 (as introduced 2-11-97)
Sponsor: Senator John J.H. Schwarz, M.D.
Committee: Health Policy and Senior Citizens

Date Completed: 3-7-97

CONTENT

Senate Bill 149 would create the “Nonprofit Hospital Sale Act” to prohibit a “person” (an individual, partnership, corporation, limited liability company, or other legal entity) from engaging in the acquisition of a hospital owned by a nonprofit corporation without first applying for and receiving the approval of the Department of Consumer and Industry Services (DCIS) and the Attorney General pursuant to the provisions of the bill; prohibit a person from acquiring a hospital owned by an entity other than a nonprofit corporation without first applying for and receiving the approval of the DCIS; provide that an acquisition application form and all related documents would be public records for purposes of the Freedom of Information Act; prescribe the procedures for filing an application and specify time limits for review of an application by the DCIS and Attorney General; prescribe specific criteria to be considered by the DCIS and/or Attorney General in deciding to approve or disapprove an application; and allow the DCIS to subpoena certain information and hold hearings under certain circumstances. The bill would apply only to the acquisition of a hospital that took place after the bill’s effective date. **Senate Bill 150** would amend the Public Health Code to allow the Department of Community Health to deny, limit, suspend, or revoke a hospital’s license if an acquiring entity failed to fulfill a commitment it had made, under the provisions of Senate Bill 149, to provide care for the disadvantaged or uninsured, or failed to follow certain procedures and safeguards designed to avoid conflict of interest by health care providers regarding patient referral. **Senate Bill 150 is tie-barred to Senate Bill 149. Following is a detailed description of the bills.**

Senate Bill 149

Application for Acquisition

An application for the “acquisition” of a hospital would have to be submitted to the DCIS, and to the Attorney General if necessary (in the case of a hospital owned by a nonprofit corporation), on forms provided by the DCIS. “Acquisition” would mean acquisition by a person of an ownership or controlling interest in a hospital, by purchase, lease, gift, or otherwise, that resulted in a change of ownership or control of 20% or more, or that resulted in the person holding a 50% or greater interest in ownership or control.

The DCIS would have to require in the application forms the name of the transferring nonprofit corporation hospital or other hospital, the name of the acquiring entity and other parties to an acquisition, the terms of the proposed agreement, the sale price, and other information the DCIS considered appropriate or necessary. The acquiring entity would have to submit a copy of the sale or acquisition agreement and all other related documents along with the application forms; a copy of the application; and copies of all additional related materials to the DCIS and to the Attorney General at the same time. The application form and all related documents submitted would be public records for purposes of the Freedom of Information Act.

Within five working days after receipt of a completed application and other related documents, the DCIS would have to publish notice of the application through means reasonably calculated to give notice to the public, and notify by first-class mail each person who had requested in writing advance notice of the filing of such applications. The notice would have to contain the fact that an application had been received; the names of the parties to the proposed agreement; a

description of the contents of the application; and the date by which a person could submit written comments about the application to the DCIS.

Review of Application

The DCIS, and the Attorney General if required, within 15 days after receiving an application would have to determine if the application was complete for purposes of review. The DCIS or Attorney General could find that an application was incomplete if a question on the application form had not been answered in whole or in part, or had been answered in a manner that did not fairly meet the question addressed, or if the application did not include attachments of supporting documents necessary to complete the answer or other required documentation. If the DCIS or the Attorney General determined that an application was incomplete, it would have to notify the applicant within 15 days after the application was received, stating the reasons for its determination of incompleteness with reference to the particular questions or documentation for which a deficiency was noted. Within 90 days after receiving a completed application, the Department, and the Attorney General if required, would have to review the application in accordance with the standards set forth in the bill and approve or disapprove the acquisition.

For an acquisition that required both approval from the DCIS and a certificate of need under the Public Health Code, the applicant would have to submit a single application for both purposes and the DCIS could review the application under a single unified review process. Following the single process, the DCIS would have to issue separate decisions for purposes of the certificate of need application and for purposes of an application filed under the bill.

Public Hearing

The DCIS, or the Attorney General if required, during the course of its review of an application would have to hold a public hearing on the acquisition.

A person could intervene in a hearing if he or she could show an interest in the acquisition distinct from that of the general public. The DCIS and the Attorney General could jointly promulgate rules for intervention.

The DCIS or the Attorney General could subpoena additional information or witnesses, require and administer oaths, require sworn statements, take

depositions, and use related discovery procedures for purposes of a public hearing, and at any time before making a decision on the application. The required hearing would have to be held within 30 days after the publication of a notice of an application. The DCIS would have to give 10 working days' notice before holding the hearing. The DCIS would have to hold the hearing in the same manner as required for a public hearing held for proposed rules under the Administrative Procedures Act.

Attorney General: Application Approval and Criteria

The Attorney General would have to review a completed application for the acquisition of a hospital owned by a nonprofit corporation in accordance with the standards prescribed in the bill. Within 90 days after receipt of a completed application, the Attorney General would have to disapprove the acquisition, or approve the acquisition with or without specific conditions or modifications. The Attorney General could not make his or her decision to approve an application subject to a condition or modification that was not directly related to the criteria specified in the bill and a condition or modification would have to bear a direct and rational relationship to the application. If the Attorney General did not act within the 90-day period, the application would be approved. An applicant, or an intervenor, could seek judicial review of the decision of the Attorney General in a court of competent jurisdiction.

In making a decision to approve or disapprove an application, the Attorney General would have to consider the following criteria:

- Whether the acquisition was permitted under the Nonprofit Corporation Act and other laws of the State governing nonprofit entities, trusts, or charities.
- Whether due care was exercised by the nonprofit corporation owning the hospital in deciding to sell or otherwise transfer assets, selecting the buyer or transferee, and negotiating the acquisition.
- The procedures used by the nonprofit corporation owning the hospital in making its decision, including, but not limited to, whether appropriate expert assistance was used.
- Whether conflict of interest was avoided, including, but not limited to, conflicts of interest related to board members of, key executives of, legal counsel for, and experts

retained by the nonprofit corporation owning the hospital or the acquiring entity.

- Whether the nonprofit corporation owning the hospital would receive fair market value for the hospital's assets. The Attorney General could employ, at the nonprofit corporation's expense, one or more necessary expert assistants in making the determination of fair market value if the application had incompletely addressed this issue and the issue of due care or procedure.
- Whether funds determined by the Attorney General to be charitable funds were placed at risk, if the acquisition were financed in part by the nonprofit corporation owning the hospital.
- Whether the nonprofit corporation owning the hospital retained a realistic option to sell or otherwise transfer any remaining interest in the hospital to the acquiring entity for fair market price.
- Whether a management contract, if any, under the acquisition was for fair market value.
- Whether the nonprofit hospital owning the hospital would use the acquisition proceeds for appropriate charitable purposes consistent with the hospital's original purpose, as determined by the Attorney General, or to promote health in the affected community and whether the proceeds would be controlled as charitable funds, as determined by the Attorney General, independently of the acquiring entity.
- If the nonprofit corporation were established to hold the proceeds of the acquisition, whether it would be based in the community and be a representative of the affected community, and the structure and governance of the nonprofit corporation.

DCIS: Application Approval and Criteria

Within 90 days after receipt of a completed application, the DCIS would have to disapprove an acquisition, or approve an acquisition with or without specific conditions or modifications. The DCIS could not make its decision to approve an application subject to a condition or modifications not directly related to the criteria prescribed in the bill, and a condition or modification would have to bear a direct and rational relationship to the application. An applicant or intervenor could seek judicial review of the DCIS decision in a court of competent jurisdiction.

In making a decision to approve or disapprove an application the DCIS would have to consider whether sufficient procedures and safeguards were included to assure the affected community continued access to affordable health care. A right of first refusal to repurchase or reacquire the assets by a successor nonprofit corporation or foundation would be evidence of a procedure or safeguard to assure access to continued health care if the nonprofit corporation owning the hospital were subsequently sold to, merged with, or otherwise transferred to another entity, or were dissolved and a new nonprofit corporation formed including an assurance that financing necessary to accomplish the repurchase, merger, or transfer was reasonably available.

The DCIS also would have to consider whether the acquiring entity had made a commitment to provide care to the disadvantaged, the uninsured, and the underinsured and to provide benefits to the affected community to promote improved health care. Activities and funding provided by the nonprofit corporation owning the hospital, or its successor nonprofit corporation or foundation, to provide such care could be considered in evaluating compliance with the commitment.

In addition, if health care providers would be offered the opportunity to invest or own an interest in the acquiring entity or in an entity related to the acquiring entity, the DCIS would have to consider whether procedures or safeguards were in place to avoid conflict of interest in patient referral by investing health care providers, and the nature of those procedures or safeguards.

Rescinding Approval/License Renewal

The DCIS would have to require periodic reports from the acquiring entity and from the nonprofit corporation owning the hospital or its successor nonprofit corporation or foundation to ensure compliance with commitments made to the disadvantaged, uninsured, and underinsured. The DCIS could subpoena information and documents and conduct on-site compliance audits at the acquiring entity's expense.

If the DCIS received information indicating that the acquiring entity was not fulfilling its commitment to the affected community, or that the patient referral patterns of a health care provider having an ownership interest in the acquiring entity or a related entity were inconsistent with the procedures or safeguards, the DCIS would have to hold a hearing after 10 days' notice to the affected parties.

If after the hearing the DCIS determined that the information was true, the DCIS could institute proceedings to rescind its approval of the acquisition.

If a person acquired a hospital without first having received the approval of the DCIS and, if necessary, the approval of the Attorney General, or if a hospital or the acquiring entity were not fulfilling its commitment to the affected community, or were not following required conflict of interest procedures or safeguards, the DCIS could not renew the hospital's license to operate.

Senate Bill 150

The bill would amend the Public Health Code to allow the Department of Community Health to deny, limit, suspend, or revoke a hospital's license if an acquiring entity failed to fulfill its commitment to the disadvantaged, uninsured, or underinsured it had made under the provisions of Senate Bill 149, or if it failed to follow the conflict of interest procedures and safeguards provided for in Senate Bill 149.

Under Senate Bill 150, if an application for a certificate of need were accompanied by an application for approval of an acquisition (under the provisions of Senate Bill 149), the Department of Community Health could review the applications together under a single, unified review process.

MCL 333.20165 (S.B. 150)

Legislative Analyst: G. Towne

FISCAL IMPACT

The bills would have an indeterminate impact on State and local units of government. The bills would result in additional workload for the Department of Attorney General and Department of Community Health. The extent would depend upon the number of acquisitions and the complexity of the transactions.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.