

1 AN ACT relating to community healthcare foundations by providing for the
2 approval and oversight of not-for-profit hospital, health maintenance organization, and
3 healthcare insurer conversions, and declaring an emergency.

4 WHEREAS, the Cabinet for Health and Family Services', 2018 Kentucky Annual
5 Hospital Utilization Report identified 69 licensed acute care hospitals and 27 critical
6 access hospitals in Kentucky; and

7 WHEREAS, the 2017 American Hospital Association Annual Survey itemized the
8 proportion of ownership of Kentucky hospitals as 10.1% as owned by state or local
9 government, 69.7% as owned by a not-for-profit entity, and 20.2% as owned by for-profit
10 corporations; and

11 WHEREAS, 2017 U.S. hospital merger and acquisition activity reached a multi-
12 year high with 115 announced deals; and

13 WHEREAS, a 2014 study in the Journal of the American Medical Association
14 found that "[h]ospital conversion to for-profit status was associated with improvements in
15 financial margins but not associated with differences in quality or mortality rates or with
16 the proportion of poor or minority patients receiving care;" and

17 WHEREAS, a 2019 law review article in the Yale Law and Policy Review states
18 that new federal law gives an advantage to for-profit corporations and "decisively tilts the
19 hospital market towards for-profit entities"; and

20 WHEREAS, the National Association of Attorneys General promulgated a model
21 law in 1998 titled the Model Act for Nonprofit Healthcare Conversion Transactions; and

22 WHEREAS, oversight of not-for-profit hospital conversions is necessary to ensure
23 that assets originally intended for a charitable purpose are not converted to the use of a
24 for-profit entity and that quality healthcare is accessible at a reasonable cost to all
25 Kentuckians;

26 NOW, THEREFORE,

27 ***Be it enacted by the General Assembly of the Commonwealth of Kentucky:***

1 ➔SECTION 1. A NEW SECTION OF KRS CHAPTER 367 IS CREATED TO
2 READ AS FOLLOWS:

3 *As used in Sections 1 to 15 of this Act:*

4 *(1) "Nonprofit healthcare entity" means any nonprofit hospital created under a trust*
5 *or will, nonprofit health maintenance organization, or nonprofit healthcare*
6 *insurer, or entities affiliated with any of these through ownership, governance, or*
7 *membership, such as a holding company or subsidiary. Nonprofit healthcare*
8 *entity shall also include but is not limited to nonprofit entities which are licensed*
9 *as hospitals, health maintenance organizations, or healthcare insurers, including*
10 *mutual corporations holding assets in charitable trust under the laws of the state*
11 *of Kentucky;*

12 *(2) "Nonprofit healthcare conversion transaction" means:*

13 *(a) The sale, transfer, lease, exchange, optioning conveyance, or other*
14 *disposition of a material amount of the assets or operations of a licensed*
15 *nonprofit hospital, nonprofit health maintenance organization, or nonprofit*
16 *healthcare insurer, including a mutual corporation holding assets in a*
17 *charitable trust, to an entity or person other than a charity; and*

18 *(b) The transfer of control or governance of a material amount of the assets or*
19 *operations of a licensed nonprofit hospital, nonprofit health maintenance*
20 *organization, or nonprofit healthcare insurer, including a mutual*
21 *corporation holding assets in a charitable trust, to an entity or person other*
22 *than a charity; and*

23 *(3) "Nonprofit healthcare insurer" means any nonprofit provider of healthcare*
24 *insurance, including hospital service associations, health service corporations,*
25 *and physician service organizations.*

26 ➔SECTION 2. A NEW SECTION OF KRS CHAPTER 367 IS CREATED TO
27 READ AS FOLLOWS:

- 1 (1) A nonprofit healthcare entity shall provide written notice to, and obtain the
2 approval of, the Attorney General, prior to entering into any nonprofit healthcare
3 conversion transaction if any transaction:
- 4 (a) Involves the sale, lease, exchange, or other disposition of a material amount
5 of its property and assets; or
- 6 (b) Will result in a material change in the nature of the activities conducted by
7 the nonprofit healthcare entity.
- 8 (2) At the time of providing notice to the Attorney General, the nonprofit healthcare
9 entity shall provide the Attorney General with written certification that a copy of
10 Sections 1 to 15 of this Act has been provided in its entirety to each member of
11 the board of trustees of the nonprofit healthcare entity.
- 12 (3) Any notice provided pursuant to this section shall include any information that
13 the Attorney General deems is required. No notice shall be effective until the
14 Attorney General has acknowledged receipt of the notice in accordance with
15 subsection (1)(k) of Section 5 of this Act.
- 16 (4) This section shall apply to any transaction within a period of five (5) years
17 between a nonprofit healthcare entity and the same acquirer or affiliate of an
18 acquirer.
- 19 (5) This section shall not apply to a nonprofit healthcare entity transaction if:
- 20 (a) The transaction is in the usual and regular course of its activities; and
- 21 (b) The Attorney General has given the nonprofit healthcare entity a written
22 waiver of the notice requirement of this section.
- 23 ➔SECTION 3. A NEW SECTION OF KRS CHAPTER 367 IS CREATED TO
24 READ AS FOLLOWS:
- 25 (1) Within ninety (90) days of written notice as required by Section 2 of this Act, the
26 Office of the Attorney General shall notify the nonprofit healthcare entity in
27 writing of its decision to approve or disapprove of the proposed nonprofit

1 healthcare conversion transaction.

2 (2) The Attorney General may extend this period for an additional ninety (90) days, if
3 the extension is necessary to obtain information pursuant to Sections 5, 6, and 7
4 of this Act.

5 ➔SECTION 4. A NEW SECTION OF KRS CHAPTER 367 IS CREATED TO
6 READ AS FOLLOWS:

7 (1) Prior to the issuance of any written decision pursuant to Section 3 of this Act, the
8 Attorney General shall conduct one (1) or more public meetings, one (1) of which
9 shall be held in the county where the majority of the nonprofit healthcare entity's
10 assets to be transferred are located. At the public meeting, the Attorney General
11 shall hear comments from interested persons regarding the proposed nonprofit
12 healthcare conversion transaction.

13 (2) At least fourteen (14) days before the meeting, the Attorney General shall cause
14 written notice to be provided of the time and place of the meeting through
15 publication in one (1) or more newspapers of general circulation in the affected
16 community.

17 ➔SECTION 5. A NEW SECTION OF KRS CHAPTER 367 IS CREATED TO
18 READ AS FOLLOWS:

19 (1) In addition to the requirements of Section 6 of this Act, in making a decision
20 whether to approve or disapprove a proposed nonprofit healthcare conversion
21 transaction, the Attorney General shall consider:

22 (a) Whether the nonprofit healthcare entity will receive full and fair market
23 value for its charitable or social welfare assets;

24 (b) Whether the nonprofit healthcare entity will receive full and fair market
25 value of governance or control rights;

26 (c) Whether the fair market value of the nonprofit healthcare entity's assets to
27 be transferred has been manipulated by the actions of the parties in a

- 1 manner that causes the fair market value of the assets to decrease;
- 2 (d) Whether the proceeds of the proposed nonprofit healthcare conversion
3 transaction will be used consistent with the trust under which the assets are
4 held by the nonprofit healthcare entity and whether the proceeds will be
5 controlled as funds independently of the acquiring or related entities;
- 6 (e) Whether the proposed nonprofit healthcare conversion transaction will
7 result in a breach of fiduciary duty, as determined by the Attorney General,
8 including any conflict of interest related to payments or benefits to officers,
9 directors, board members, executives, and experts employed or retained by
10 the parties;
- 11 (f) Whether the governing body of the nonprofit healthcare entity exercised
12 due diligence in deciding to dispose of the nonprofit healthcare entity's
13 assets, selecting the acquiring entity, and negotiating the terms and
14 conditions of the disposition;
- 15 (g) Whether the nonprofit healthcare conversion transaction will result in
16 private inurement to any person;
- 17 (h) Whether healthcare providers will be offered the opportunity to invest or
18 own an interest in the acquiring entity or a related party, and whether
19 procedures or safeguards are in place to avoid any conflict of interest in
20 patient referrals;
- 21 (i) Whether the terms of any management or services contract negotiated in
22 conjunction with the proposed nonprofit healthcare conversion transaction
23 are reasonable;
- 24 (j) Whether any foundation established to hold the proceeds of the sale will be
25 broadly based in the community and representative of the affected
26 community, taking into consideration the structure and governance of such
27 foundation;

1 (k) Whether the Attorney General has been provided with sufficient
2 information and data by the nonprofit healthcare entity to evaluate
3 adequately the proposed nonprofit healthcare conversion transaction or the
4 effects thereof on the public, so long as the Attorney General has notified
5 the nonprofit healthcare entity or the acquiring entity of any inadequacy of
6 the information or data and has provided a reasonable opportunity to
7 remedy such inadequacy; and

8 (l) Any other criteria the Attorney General considers necessary to determine
9 whether the nonprofit healthcare entity will receive full and fair market
10 value for its assets to be transferred as required in administrative
11 regulations promulgated by the Attorney General under Section 12 of this
12 Act.

13 (2) Subject to the Kentucky Model Procurement Code in KRS Chapter 45A, the
14 Attorney General shall also consult with and receive advice from experts or
15 persons with expertise in the matter of nonprofit healthcare transactions.

16 ➔SECTION 6. A NEW SECTION OF KRS CHAPTER 367 IS CREATED TO
17 READ AS FOLLOWS:

18 In making a decision whether to approve or disapprove an application, the Attorney
19 General shall also determine whether the proposed nonprofit healthcare conversion
20 transaction may have a significant effect on the availability or accessibility of
21 healthcare services to the affected community. In making this determination, the
22 Attorney General shall consider:

23 (1) Whether sufficient safeguards are included to ensure the affected community
24 continued access to affordable care;

25 (2) Whether the proposed nonprofit healthcare conversion transaction creates or has
26 the likelihood of creating an adverse effect on the access to or availability or cost
27 of healthcare services to the community;

1 (3) Whether the acquiring entities have made a commitment, at least comparable to
2 the nonprofit healthcare entity, to provide healthcare to the disadvantaged, the
3 uninsured, and the underinsured and to provide benefits to the affected
4 community to promote improved healthcare. Activities and funding provided by
5 the nonprofit healthcare entity or its successor nonprofit healthcare entity or
6 foundation to provide such healthcare or to provide support or medical education
7 and teaching programs or medical research programs shall be considered in
8 evaluating compliance with this commitment;

9 (4) Whether the nonprofit healthcare conversion transaction will result in the
10 revocation of hospital privileges;

11 (5) Whether sufficient safeguards are included to maintain appropriate capacity for
12 health science research and healthcare provider education; and

13 (6) Whether the proposed nonprofit healthcare conversion transaction demonstrates
14 that the public interest will be served, considering the essential medical services
15 needed to provide safe and adequate treatment, appropriate access, and balanced
16 healthcare delivery to the residents.

17 ➔SECTION 7. A NEW SECTION OF KRS CHAPTER 367 IS CREATED TO
18 READ AS FOLLOWS:

19 (1) The Attorney General may demand that the nonprofit healthcare entity giving
20 notice under Section 2 of this Act provide additional information that the
21 Attorney General deems necessary to complete the review of any proposed
22 nonprofit healthcare conversion transaction.

23 (2) A failure by the nonprofit healthcare entity giving notice under Section 2 of this
24 Act to provide timely information as required by subsection (1) of this section
25 shall be considered sufficient ground for the Attorney General to disapprove the
26 proposed nonprofit healthcare conversion transaction.

27 ➔SECTION 8. A NEW SECTION OF KRS CHAPTER 367 IS CREATED TO

1 READ AS FOLLOWS:

2 Subject to the Kentucky Model Procurement Code in KRS Chapter 45A, the Attorney
 3 General may do any of the following to assist in the review of the proposed nonprofit
 4 healthcare conversion transaction described in Section 2 of this Act:

5 (1) Contract with, consult, and receive advice from any state agency or the United
 6 States on such terms and conditions the Attorney General deems appropriate; or

7 (2) At the Attorney General's sole discretion, contract with such experts or
 8 consultants the Attorney General deems appropriate to assist in reviewing the
 9 proposed nonprofit healthcare conversion transaction.

10 ➔SECTION 9. A NEW SECTION OF KRS CHAPTER 367 IS CREATED TO
 11 READ AS FOLLOWS:

12 The Attorney General shall be entitled to reimbursement from the nonprofit healthcare
 13 entity giving notice pursuant to Section 2 of this Act for all reasonable and actual costs
 14 incurred by the Attorney General in reviewing any proposed nonprofit healthcare
 15 conversion transaction under Sections 1 to 15 of this Act, including attorney fees at the
 16 billing rate used by the Attorney General to bill state agencies for legal services. The
 17 nonprofit healthcare entity giving notice under Section 2 of this Act, upon request,
 18 shall pay the Attorney General promptly for all such costs.

19 ➔SECTION 10. A NEW SECTION OF KRS CHAPTER 367 IS CREATED TO
 20 READ AS FOLLOWS:

21 All documents and records submitted to the Attorney General pursuant to Sections 1 to
 22 15 of this Act shall be deemed open records and subject to public inspection, unless:

23 (1) The record is excluded from inspection under KRS 61.870 to 61.884;

24 (2) The record involves a trade secret or other legally protectable intellectual
 25 property or confidential proprietary information of the corporation or of a
 26 vendor; or

27 (3) The disclosure of the record could impair or adversely impact the security of the

1 healthcare entity.

2 ➔SECTION 11. A NEW SECTION OF KRS CHAPTER 367 IS CREATED TO
3 READ AS FOLLOWS:

4 (1) Any nonprofit healthcare conversion transaction entered into in violation of the
5 notice, review, or approval requirements of Sections 1 to 15 of this Act shall be
6 null and void and each member of the governing boards and the chief financial
7 officers of the parties to the nonprofit healthcare conversion transaction may be
8 subject to a civil penalty of up to five hundred thousand (\$500,000) dollars, the
9 amount to be determined by the court in the county in which the nonprofit
10 healthcare entity's assets to be transferred are located. The Attorney General
11 shall institute proceedings to impose the penalties provided in this section.

12 (2) In addition to the penalties provided in subsection (1) of this section, no permit to
13 operate a hospital may be issued or renewed under Sections 1 to 15 of this Act or
14 under any other applicable statute or administrative regulation if there is a
15 nonprofit healthcare conversion transaction entered into in violation of the
16 notice, review, and approval requirements of Sections 1 to 15 of this Act.

17 ➔SECTION 12. A NEW SECTION OF KRS CHAPTER 367 IS CREATED TO
18 READ AS FOLLOWS:

19 The Attorney General shall promulgate administrative regulations to carry out the
20 provisions of Sections 1 to 15 of this Act.

21 ➔SECTION 13. A NEW SECTION OF KRS CHAPTER 367 IS CREATED TO
22 READ AS FOLLOWS:

23 Nothing in Sections 1 to 15 of this Act shall be construed to limit the common law
24 authority of the Attorney General to protect charitable trusts and charitable assets in
25 the Commonwealth. The penalties and remedies provided in Sections 1 to 15 of this Act
26 are in addition to, and not a replacement for, any other civil or criminal actions which
27 the Attorney General may take under either the common law or statutory law,

1 including rescinding the nonprofit healthcare conversion transaction, granting
 2 injunctive relief, or any combination of these and other remedies available under
 3 common law or statutory law.

4 ➔SECTION 14. A NEW SECTION OF KRS CHAPTER 367 IS CREATED TO
 5 READ AS FOLLOWS:

6 Except as otherwise provided in Sections 1 to 15 of this Act, on the effective date of this
 7 Act:

- 8 (1) Sections 1 to 15 of this Act applies to all nonprofit healthcare transactions
 9 entered into after the effective date of this Act; and
 10 (2) An act done before the effective date of the Act is not affected by Sections 1 to 15
 11 of this Act.

12 ➔SECTION 15. A NEW SECTION OF KRS CHAPTER 367 IS CREATED TO
 13 READ AS FOLLOWS:

14 This Act may be cited as the Kentucky Nonprofit Healthcare Conversion Act.

15 ➔Section 16. KRS 386B.4-130 is amended to read as follows:

16 (1) Except as otherwise provided in subsection (2) of this section, if a particular
 17 charitable purpose becomes unlawful, impracticable, impossible to achieve, or
 18 wasteful:

- 19 (a) The trust shall not fail, in whole or in part;
 20 (b) The trust property shall not revert to the settlor or the settlor's successors in
 21 interest; and
 22 (c) The court may apply cy pres to modify or terminate the trust by directing that
 23 the trust property be applied or distributed, in whole or in part, in a manner
 24 consistent with the settlor's charitable purposes.

25 (2) A provision in the terms of a charitable trust that would result in distribution of the
 26 trust property to a noncharitable beneficiary prevails over the power of the court
 27 under subsection (1) of this section to apply cy pres to modify or terminate the trust

1 only if, when the provision takes effect:

2 (a) The trust property is to revert to the settlor and the settlor is still living; or

3 (b) Fewer than twenty-one (21) years have elapsed since the date of the trust's
4 creation.

5 (3) **The use of any proceeds from a nonprofit healthcare conversion transaction as**
6 **provided in Sections 1 to 15 of this Act shall be subject to cy pres proceedings**
7 **under this section.**

8 (4) The Circuit Court shall have exclusive jurisdiction over actions to identify a
9 charitable beneficiary of a trust.

10 ➔Section 17. Whereas the protection and promotion of the public health is of
11 paramount importance, an emergency is declared to exist, and this Act takes effect upon
12 its passage and approval by the Governor or upon its otherwise becoming law.