

OPINION

Public charities alerted to new guidelines on asset transfers

By Jennifer Gallop



Increasingly, Massachusetts public charities — such as schools, nursing homes, foundations and churches — are selling their property, paying off their debt, and closing up shop

or permanently changing their activities. The problem is that many of these entities do not know that they are required to notify the attorney general before doing so.

Under G.L.c. 180, §8A(c), when a public charity transfers all or substantially all of its assets and materially changes the nature of its activity (usually dissolving), it must provide at least 30 days notice to the attorney general.

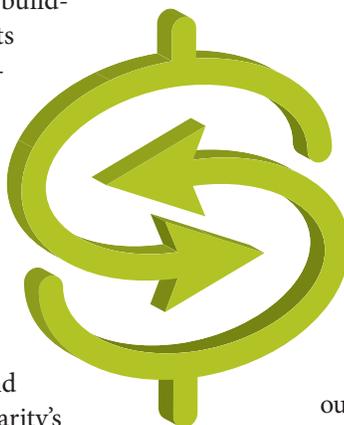
The statute was enacted in the wake of *Attorney General v. Hahnemann Hospital*, 397 Mass. 820 (1986), in which a hospital

sought to sell its building and amend its articles of organization to transform itself into a grant-maker.

The *Hahnemann* court recognized that to allow such a sale and profound change in the charity's activity without review by the attorney general could result in inappropriate departures by the board from the charity's mission.

The AG's Non-Profit Organizations/Public Charities Division, or NPO Division, is the department that receives and reviews all written notices of such transactions. In an effort to better inform the public and provide consistency in the information submitted, the NPO Division reached out to members of its advisory committee for assistance in developing new Section 8A(c) notice guidance.

The guidelines have been posted on the AG's website at www.mass.gov/ago/charities and are located under "Charitable Organizations" and "AG's Guidelines on Notice Requirements of G.L.c. 180, §8A(c)."



For charitable organizations closing their doors and dissolving, the AG recently published separate guidance reflecting the significant changes to the dissolution process under G.L.c. 180, §11A.

After providing a brief legal background of the statute, the guidelines lay out a three-prong analysis as to when the statute applies to a transaction: (i) confirming public charity status, (ii) describing what constitutes "all or substantially all" of the charity's assets, and (iii) identifying a "material change in the nature of [its] activities."

The guidelines go on to outline the five components required for adequate notice:

- a description of the charity's documented decision-making process;
- details relating to the assets involved, including their history and any restrictions on their use;
- demonstration of the fair market value of consideration being paid for the assets;
- identification of the purchaser or transferee, its relationship to the charity, and evaluation of the arm's length nature of the proposed transaction; and

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- the charity's plan for the use of the resulting proceeds.

The guidelines also include references to other legal requirements that may apply when the law is triggered. Specifically, where there is material change in the asset use or modification of donor restrictions, a cy pres petition may be needed.

In addition, when there is a sale of assets for less than fair market value, the organization may be required to file a petition with the Supreme Judicial Court (single justice session for Suffolk County), following the principles articulated in *Massachusetts Charitable Mechanic Ass'n v. Beede, et al.*, 320 Mass. 601 (1947).

In both cases, the attorney general's assent is required and sample documents are available from the NPO Division.

For charitable organizations closing their doors and dissolving, the AG recently published separate guidance reflecting the significant changes to the dissolution process under G.L.c. 180, §11A (enacted pursuant to Chapter 165 of the Acts of 2010, An Act Further Regulating Public Charities, effective July 19, 2010).

Step-by-step instructions, model documents, and forms for charities distin-

guishing those with and without assets remaining are located at www.mass.gov/ago/charities under "Dissolving a Charitable Entity."

Some key highlights of the 8A guidelines include:

- clarifying that the "substantially all" standard is met by a transaction involving 75 percent or more of the public charity's assets;
- illustrating what constitutes "a material change in the nature of the activities," e.g., changing from service provider to grant-making entity; and
- providing examples of situations in which §8A(c) does not apply, such as a long-term lease, merger or consolidation, amendment in purpose, affiliation with another charitable organization, joint venture, and hospital or HMO transactions that trigger notice requirements under G.L.c. 180, §8A(d).

The guidelines include answers to frequently asked questions regarding, among other things, religious charities and transactions with for-profits. They also contemplate, however, that some situations

will remain where consultation with the NPO Division may still be necessary as to whether §8A(c) compliance is appropriate, e.g., if an organization is uncertain of whether a transaction involves substantially all its assets.

Although the §8A(c) notice period is 30 days, bear in mind that additional time may be required before the NPO Division is able to complete its review of a proposed transaction.

An organization submitting §8A(c) notice needs to be compliant with its statutory reporting obligations in order for notice to be approved. In addition to making sure the charity's house is in order, the NPO Division may have questions and/or require additional information in connection with the notice that the organization will need to assemble in order to provide an appropriate response.

It is also possible that modifications to the proposed transaction may be required.

Attorneys who work with charitable organizations should familiarize themselves with the guidelines and notice requirements in order to properly advise their clients in connection with strategic planning. MLW