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Attorney General Guidelines on Notice Requirements of G.L. c. 180, §8A(c)

As economic and other factors exert pressure on for-profit organizations, so, too, are charitable organizations exposed to financial risks. Organizations whose missions may have become outdated or whose facilities have deteriorated, such as a retirement home with too few residents or a church that is unable to properly maintain its facilities, potentially face the predicament of revenue not keeping pace with expenses. As the board of directors reviews an organization's financial health, which it should do on a regular basis, it may see the signs of one or more of these unfortunate trends. A charitable organization also may be unable to sustain an interested or active board. In such cases, the board may be faced with difficult decisions relating to whether it is in the organization's best interest to sell its assets and dissolve. In addition, an organization in healthier financial circumstances may conclude that a sale of underutilized assets is a good way to generate cash in order to support and enhance other aspects of the organization's charitable mission. All members of the board have a fiduciary duty to the organization to ensure that they are being responsible fiscal stewards in these circumstances.

The purpose of these guidelines is to explain the expectations of the Attorney General's Non-Profit Organizations/Public Charities Division (the "Division") as to the notice required when a charitable organization is contemplating a sale or other disposition of a significant amount of its assets and, at the same time, a material change in its activities.

1. Legal Background.

The Attorney General has authority under common law and under G.L. c. 12, §8 to "enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof." In addition, Massachusetts law requires a public charity that has decided to transfer or sell substantially all of its property and materially change its activities to provide notice to the Attorney General.

Commonly referred to as "Section 8A," the statute requiring notice, G.L. c. 180, §8A(c),¹ was enacted after the decision in *Attorney General v. Hahnemann Hospital*, 397 Mass. 820 (1986). In that case, a hospital proposed to sell all of its assets and change its articles of organization to become a grant-making institution. The *Hahnemann* court stated that advance notice to the Attorney General and court approval may be required before a charity may sell all

¹ "A corporation constituting a public charity shall give written notice to the attorney general not less than thirty days before making any sale, lease, exchange, or other disposition . . . of all or substantially all of its property and assets if that sale, lease, exchange or other disposition involves or will result in a material change in the nature of the activities conducted by the corporation."

or substantially all of its assets.² Section 8A was enacted to codify when notice to the Attorney General is required, leaving it to the Attorney General and the courts to determine when court approval is required.

The *Hahnemann* court added that charities may not amend their charter purposes “to devote funds to new charitable purposes whenever the trustees decided to do so.” If such changes were permitted without notice to the Attorney General, the Court added, a charity could “evade dissolution by reconstituting itself and directing all funds to its newly stated purposes” and “might eviscerate the Attorney General’s power and responsibility”³ under G.L. c. 12, §8.

This Advisory explains:

- a. when notice to the Attorney General under Section 8A(c) (referred to herein as an “8A(c) notice”) is and is not required; and
- b. when court approval is required in the view of the Attorney General.

2. When G.L. c. 180, §8A(c) Applies.

To determine whether a non-profit organization must provide an 8A(c) notice to the Attorney General, the following important questions must be answered.

- First, is the entity a public charity?

The definition of what constitutes a public charity is not derived from statute but from court decisions, which provide that there are three requirements for an entity to be considered a public charity in the Commonwealth.⁴ Generally speaking, the entity must: be a non-profit organization; have a charitable purpose; and benefit an indefinite population (for example, benefits not limited to a finite membership). Typically, if an organization files an annual report under G.L. c. 12, §8F,⁵ it is a public charity which would be required to file an 8A(c) notice when selling its assets and materially changing its activities. The opposite, however, is not necessarily true. Organizations such as religious entities specifically exempted from filing under G.L. c. 12, §8F are still public charities and, therefore, must notify the Attorney General of transactions that meet the §8A(c) requirements.⁶

- Second, does the transaction involve all or substantially all of the public charity’s property?

Notice to the Attorney General is required under Section 8A(c) only when the transaction involves all or substantially all of a charity’s assets. The meaning of the word “all” is

² *Attorney General v Hahnemann Hospital*, 397 Mass. at 829.

³ *Id.* at 836.

⁴ Section 8A applies only to charitable corporations incorporated in Massachusetts. G.L. c. 180, §2(c) (definition of “corporation”).

⁵ All public charities except those exempted must submit an annual filing to the Division, “on forms prescribed by the director and shall contain such financial and other information as the director may require.”

⁶ *See Congregational Church of Chicopee Falls v. Attorney General*, 376 Mass. 545, 549-550 (1978).

clear, but there is little definitive statutory or case law guidance on what constitutes “substantially all” as contemplated by the statute.⁷ The Attorney General expects to receive an 8A(c) notice if more than 75 % of the organization’s assets are being disposed of. If the board of directors is not certain whether such a transaction involves “substantially all” of a charity’s property, it should obtain professional legal advice. Also, if the contemplated asset disposition is significant, but not necessarily “all or substantially all,” the Division recommends that the public charity submit an informal written explanation to the Division so that it can evaluate whether the notice is required or if the transaction raises other concerns under the law of public charities. For example, other transactions may require court approval even where they do not involve substantially all of a charity’s assets, such as transactions involving material changes in asset use, modification of donor restrictions, or sale of assets for less than fair market value. It is in the organization’s and the board members’ best interest to maintain records of the decision-making process that was followed in the event that questions arise after a transaction is completed that did not involve notice to the Attorney General.

- Third, will there be a “material change in the nature of the activities conducted by” the public charity?

The question of what constitutes a material change involves evaluating how the charity’s activities will change once the transaction is completed. For example, if a charity dedicated to providing affordable housing is selling its apartment building and intends to use the proceeds to make grants to assist other non-profits, a material change would result from the disposition because the entity is fundamentally altering its operation from service provider to grant-maker. In contrast, a school that is selling its property but using the funds to continue providing educational programs at another location and which will continue to serve substantially the same community is not making a material change in its activities because the entity is continuing the same activity.

If an entity answers “yes” to the above three questions, notice under G.L. c. 180, §8A(c) must be provided to the Attorney General. If the organization is uncertain, the organization may request informal guidance from the Division.

3. When G.L. c. 180, §8A(c) Does Not Apply.

The Section 8A(c) notice requirement does not apply to a mortgage, pledge of, or granting of a security interest in, property or assets, under G.L. c. 180, §8A(b). The notice requirement also does not apply in the circumstances summarized below, unless the transaction otherwise will result in a transfer of all or substantially all of the charity’s property or assets and a material change in the nature of the activities conducted by the charity:

⁷ Courts have considered the definition of “substantially all” in a variety of contexts including employment, intellectual property, tax, corporations, and retirement benefits. While some have held that the term means not all, but not much less than all, others have considered a percentage as low as 70% as constituting “substantially all.” Comments to G.L. c. 156D, §12.01, addressing the sale of a for-profit’s assets, may be instructive: they state that “[t]he phrase ‘substantially all’ is synonymous with ‘nearly all’ and was added merely to make it clear that the statutory requirements could not be avoided by retention of some minimal or nominal residue of the original assets.”

- (a.) a long term lease;
- (b.) merger or consolidation under G.L. c. 180, §10;
- (c.) amendment of purpose under G.L. c. 180, §7;
- (d.) transactions by nonprofit acute care hospitals or health maintenance organizations subject to the requirements of G.L. c. 180, §8A(d);
- (e.) affiliation with another charitable organization, such as a parent-subsidary relationship by means of bylaw amendments, overlapping boards, or contractual agreements, or the termination of such an affiliation;
- (f.) a joint venture, or other form of joint enterprise, with another entity.

4. What is Included in a Section 8A(c) Notice.

G.L. c. 180, §8A(c) requires written notice to be filed no later than thirty days before the closing of the transaction. While thirty days notice is mandated by statute, notice should be submitted as soon as possible after all of the transaction's details have been agreed to, which will facilitate an orderly review of the transaction and avoid delaying its closing. There is no specific form for submitting an 8A(c) notice because the nature and circumstances of these transactions vary widely, but the specific information below (i.e., the "5 P's") should be included.

(a) Process. As required under §8A(c), the sale must be authorized by a vote of two-thirds of the members entitled to vote⁸ and the public charity must follow statutory notice requirements under G.L. c. 180, §6B.⁹ It is important to maintain records of the process used by the charity in coming to this decision, such as minutes of, and votes taken at, board of directors' meetings, though they need not be provided as part of the 8A(c) notice. Information relating to how and when the board approved the transaction is sufficient.

(b) Property. A full description of the assets involved is required, including location, how and when the charity acquired the asset, if it was obtained with any restrictions on use, and any other information that is relevant to the charity's ownership of the property.

(c) Price. It is important to demonstrate that the sale price constitutes fair market value by, for example, an independent appraisal of the assets being sold. If there is an appraisal, a copy should be enclosed with the notice. If an appraisal was not performed, the charity must show by other means that the price constitutes fair market value or, if not, explain why. If an appraisal is not available, you may contact the Division as to what other evidence of fair market value is acceptable. If the consideration is significantly below fair market value, it may be necessary for the charity to file a petition in the Supreme Judicial Court (Single Justice Session for Suffolk County) with the assent of the Attorney General, following the principles articulated in *Massachusetts Charitable Mechanic Ass'n v. Beede et al.*, 320 Mass. 601 (1947). See Part 5, below.

⁸ Under G.L. c. 180, §8A(c), the sale must be authorized by a vote of two-thirds of the organization's members, or if there are no members entitled to vote, authorization by two-thirds of the organization's directors.

⁹ "If members of a corporation are entitled to vote on any corporate action but are not entitled to vote on action proposed under section seven or eight A, the corporation shall give to such members prior notice of any action proposed under said section seven or eight A. Such notice shall be given in any manner reasonably likely to make such members aware of the proposed action, and a defect in the giving of such notice shall not invalidate or otherwise affect such action."

(d) Purchaser. It is preferable that a transaction of this sort be at arm's-length between unrelated parties. Significant conflicts of interest arise when related parties¹⁰ such as officers, directors, board members, senior management employees, or their family members are involved in the purchase of a charity's assets. Questions that must be answered include whether the related party is being given a unique opportunity, is taking advantage of the charity by not paying fair value for the property, or is otherwise inappropriately benefiting from his or her relationship with the charity. A description of any prior relationship between the buyer and seller should be provided, with substantial detail if the transaction involves a related party. Again, adequate record-keeping is important because the board may be asked to produce the supporting documents as to how it addressed any conflict of interest issues.

(e) Proceeds. Information as to how the charity intends to use the proceeds resulting from the transaction is critical. If the proceeds will be used for similar activities, no §8A(c) notice is required. If the proceeds will be used for new or materially different activities or if the charity will cease to operate, a full description of how the funds will be used is necessary.

A public charity's 8A(c) notice containing all of the above and any other pertinent information should be sent to the attention of Chief, Non-Profit Organizations/Public Charities Division, One Ashburton Place, Boston, MA, 02108. Following its review of the notice, the Division may request other information. The Division considers the thirty day notice period to have begun when all of the information articulated above has been submitted and any follow-up questions or requests for documentation or other information have been addressed by the charity. After its review, the Division usually will issue a letter indicating the charity's statutory notice obligations have been met.

5. When Is Court Approval Required.

In connection with an 8A(c) transaction, one of three court approvals may be needed depending on the public charity's plans. The charity may decide to materially change its activities and continue operating or to halt its activities and dissolve. Each scenario requires judicial approval, but with slightly different submissions to the court.

- (a) Change in Corporate Purpose. If the charity proposes to devote the proceeds of the transaction to charitable activities materially different from those previously conducted by the organization or seeks to remove or modify donor-imposed restrictions on the use of the proceeds without the donor's consent, it must obtain court approval to do so. When the original purpose of a charitable trust becomes impossible, impracticable or illegal, a court may reform the purpose under the doctrine of *cy pres* (derived from the French term meaning "as near as possible") so

¹⁰ See the definition for "Related Party" in the definition section of the Division's Form PC Instructions, http://www.mass.gov/Cago/docs/nonprofit/form_pc_instructions_2008version_final.pdf

the trust does not fail.¹¹ Massachusetts recognizes that *cy pres*, based in charitable trust law, applies to charitable corporations.¹²

When the charity proposes to continue with different activities, it must provide a *cy pres* complaint with respect to such assets which explains why it is impossible, impracticable or illegal for it to continue its current activities, why a change in activities is necessary, and how the use of the assets for the proposed activities is appropriate. If, instead, a donor-restriction on the property and the resulting proceeds is interfering with the accomplishment of the organization's charitable purpose, under the doctrine of equitable deviation, an equity complaint may be submitted to the court to explain why the proposed change is appropriate.¹³ A *cy pres* or deviation complaint should first be submitted to the Attorney General for review and assent and additional information or documents may be requested. After receiving the Attorney General's assent, the complaint may be filed with either the Probate Court or the Single Justice Session of the Supreme Judicial Court for Suffolk County.

(b) Disposition of a Large Part of a Charity's Assets Without Receiving Fair Value. If the charity proposes to transfer a large part of its assets to another charity not controlled by the transferor and the consideration to be received in return is significantly below fair market value, it may be necessary for the charity to file a petition in the Supreme Judicial Court (Single Justice Session for Suffolk County) with the assent of the Attorney General, following the principles articulated in *Massachusetts Charitable Mechanic Ass'n v. Beede et al.*, 320 Mass. 601 (1947). Sample petitions are available from the Division.

(c) Dissolution. Under G.L. c. 180, §11A, in order for a charity to wind up its activities, it must file a dissolution complaint with the single justice of the Supreme Judicial Court for Suffolk County.¹⁴ The complaint will indicate that the charity either has no assets to distribute or seeks authority to transfer its remaining assets to charities with similar missions under the *cy pres* standard. As noted above, Section 8A(c) vote and notice requirements do not apply. However, the dissolution must first be approved by a majority of the directors. The draft filing should first be submitted to the Attorney General with such additional information or documents that may be required by the Attorney General.¹⁵

¹¹ Under the related doctrine of equitable deviation, the court may adjust subordinate details of the trust that are interfering with the accomplishment of the charitable purpose. *See, e.g., Trustees of Dartmouth College v. Quincy*, 357 Mass. 521, 529-534 (1970); *Wigglesworth v. Cowles*, Mass.App.Ct. 420, 429 (1995).

¹² *See Congregational Church of Chicopee Falls v. Attorney General*, 376 Mass. at 547 n.2.

¹³ Samples of *cy pres* and equitable deviation filings are available from the Division upon request.

¹⁴ "A charitable corporation constituting a public charity organized under the provisions of general or special law, which desires to close its affairs may, by a vote of a majority of its board of directors, authorize a petition for its dissolution to be filed in the supreme judicial court setting forth in substance the grounds of the application for dissolution and requesting the court to authorize the administration of its funds for such similar public charitable purposes as the court may determine. The provisions of this section shall constitute the sole method for the voluntary dissolution of any such charitable corporation."

¹⁵ More information on the dissolution process and sample complaints can be found at www.mass.gov/ago/charities, under "Charitable Organizations" and "Dissolving a Charity."

Draft *cy pres*, deviation and dissolution complaints should be directed to the Non-Profit Organizations/Public Charities Division, One Ashburton Place, Boston, MA, 02108.¹⁶

6. Frequently Asked Questions.

(a) If the non-profit organization benefits its members rather than the indefinite public and, therefore, is not a public charity but was organized as a fraternal organization (e.g., business leagues, labor unions, or recreational clubs), is 8A(c) notice necessary?

*Probably not.*¹⁷ *However, the board of directors should review the articles of organization and consider whether the entity may have in its operation acted as a charity by benefiting the indefinite public, e.g., performing charitable activities in the community or holding donated funds dedicated to public purposes. If so, 8A(c) notice may be required. See Part 2 above.*

(b) Since a religious entity is not required to register or file with the Division, does it have to submit an 8A(c) notice?

Yes. Even though religious entities are exempt from the registration and filing requirements of G.L. c. 12, §§8E and 8F, they are still public charities and must file notice under §8A(c). See Part 2 above.

(c) If the public charity wants to sell substantially all of its assets to a for-profit, is that allowed?

Yes, so long as the charity can establish that it received fair market value and otherwise complies with applicable law. See Part 4 above. If the charity intends to change its activities or dissolve, 8A(c) notice and court approval is required, see Part 5 above. In addition, other requirements may be placed on the buyer to share with the charity profits realized on future sale of the property within a specified time period to ensure that the property was not undervalued at the time of the sale. Also, if the charity is a non-profit acute care hospital or health maintenance organization, it must comply with the requirements under G.L. c. 180, §8A(d).

(d) If, the public charity is selling substantially all of its assets but does not yet know how the proceeds will be used, is an 8A(c) notice required?

¹⁶ In addition, the organization should familiarize itself with the IRS Form 990 notice requirements for organizations that have obtained a Section 501(c)(3) status and are halting or altering their activities significantly.

¹⁷ Many non-profit health maintenance organizations in Massachusetts operate primarily for the benefit of their members, or insureds, but are nonetheless public charities because they operate to promote the health of such members. For certain transactions, they are subject to the requirements of G.L. c. 180, Section 8A(d).

Yes. If the charity's board of directors is uncertain as to how the proceeds from the sale will be used, it does not know whether there will be a material change in the nature of the entity's activities. In addition, there may be fiduciary duty issues arising out of a decision to sell the charity's property without a plan for the subsequent use of the sale proceeds.

(e) Is an 8A notice necessary if the charity is making a donation of a large part (but less than substantially all) of its assets without receiving fair value in return?

No, but the charity may need to file a petition with the Supreme Judicial Court (Single Justice Session for Suffolk County) with the Attorney General's assent, since a charity cannot ordinarily give away a large part of its assets to an organization not controlled by the charity. See Part 4(c) and Part 5(b) above.