

Chapter 246-312 WAC

ACQUISITION OF NONPROFIT HOSPITALS

WAC

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PART I - GENERAL PROVISIONS

WAC 246-312-010 Purpose. The purpose of this chapter is to implement chapter 332, Laws of 1997, the nonprofit hospital sales review program. The legislature has determined that the state has an interest to assure the continued existence of accessible, affordable health care facilities. To achieve this goal the department of health is responsible for reviewing and approving the acquisition of nonprofit hospitals by for-profit entities. The department may approve an acquisition of a nonprofit hospital only if it determines that the nonprofit hospital has taken appropriate steps to safeguard charitable assets and any proceeds of the acquisition are used for appropriate charitable health and health care purposes.

[Statutory Authority: 1997 c 332 § 14. WSR 97-21-052, § 246-312-010, filed 10/13/97, effective 11/13/97.]

WAC 246-312-020 Definitions. "Acquisition of a nonprofit hospital" means an acquisition by a person of an interest in a nonprofit hospital, whether by a purchase, merger, lease, gift, joint venture, or otherwise, that results in a change of ownership or control of twenty percent or more of the assets of the hospital, or that results in the acquiring person holding or controlling fifty percent or more of the assets of the hospital.

This type of acquisition does not include a transaction where the acquiring person:

- Is a nonprofit corporation having a substantially similar charitable health care purpose as the nonprofit corporation from whom the hospital is being acquired, or is a government entity;
- Is exempt from federal income tax under section 501 (c)(3) of the Internal Revenue Code or as a government entity; and
- Will maintain representation from the affected community on the local board of the hospital.

"Acquisition of a hospital owned by a public hospital district" means an acquisition by a person of any interest in that hospital, whether by a purchase, merger, lease, or otherwise, that results in a change of ownership or control of twenty percent or more of the assets of a hospital currently licensed and operating under RCW 70.41.090.

Acquisition of a public hospital district hospital does not include a transaction where the other party or parties are:

- Nonprofit corporations having a substantially similar charitable health care purpose;
- Organizations exempt from federal income tax under section 501 (c)(3) of the Internal Revenue Code; or
- Governmental entities.

This type of acquisition also does not include a transaction where the other party:

- Is an organization that is a limited liability corporation, a partnership, or any other legal entity and the members, partners, or otherwise designated controlling parties of the organization are all nonprofit corporations having a charitable health care purpose;
- Are organizations exempt from federal income tax under section 501 (c)(3) of the Internal Revenue Code; or
- Are governmental entities.

"Agreement" means a contract, arrangement, or understanding, whether formal or informal, oral or written.

"Applicant" means the acquiring party.

"Attorney general" means the Washington state attorney general.

"Department" means the Washington state department of health.

"Document" means all computer files and any written, recorded, or graphic material of every kind, that is in a person's possession, custody, or control, regardless of the form of the media in which it is preserved or by whom it was prepared. It includes electronic correspondence and drafts of documents, copies of documents that are not identical duplicates of the originals, and copies of documents the originals of which are not in one's possession, custody or control.

"Hospital" means any entity that is: Defined as a hospital in RCW 70.41.020 and is required to obtain a license under RCW 70.41.090; or a psychiatric hospital required to obtain a license under chapter 71.12 RCW.

"Identify" means to provide a statement of: In the case of a person other than a natural person, the names, address (including ZIP code) of the principal place of business, telephone number, and name of chief executive officer; in the case of a natural person, his or her name, business address (including ZIP code) and business telephone number, employer and title or position; in the case of a document, the title of the document, the author, the title or position of the addressee, the type of document, the date it was prepared, the number of pages it comprises, and, if applicable, its production number; in the case of a communication, the date of the communication, the type of communication (telephone conversation, number etc.), the place where the communication took place, the identity of the person who made the communication, the identity of each person who received the communication and each person present when it was made, and the subject matter discussed.

"Nonprofit hospital" means a hospital owned by a nonprofit corporation organized under Title 24 RCW.

"Person" means an individual, a trust or estate, a partnership, a corporation including associations, limited liability companies, joint stock companies, and insurance companies.

"Plans" means tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.

"Relating to" means in whole or in part, constituting, containing, concerning, embodying, reflecting, describing, analyzing, identifying, stating, referring or dealing with, or in any way pertaining to.

[Statutory Authority: Chapter 70.45 RCW and RCW 70.44.007. WSR 98-14-056, § 246-312-020, filed 6/26/98, effective 7/27/98.]

PART II - APPLICATION REQUIREMENTS

WAC 246-312-030 Application information. (1) Acquiring persons may obtain an application from the department.

(2) An application is determined to be complete when the acquiring person submits a completed application, the documents required in WAC 246-312-040 and required fee(s).

(3) The department may subpoena additional information or witnesses, require and administer oaths, require sworn statements, take depositions, and use related discovery procedures at any time prior to making a decision on the application.

(4) The application and supporting documents are subject to the Public Disclosure Act and any exemptions (chapter 42.17 RCW).

[Statutory Authority: Chapter 70.45 RCW and RCW 70.44.007. WSR 98-14-056, § 246-312-030, filed 6/26/98, effective 7/27/98.]

WAC 246-312-035 Amendments to the application. The applicant may submit amendments to its application at any time. Timelines will begin again from the application stage of the review process. A processing and review fee is required for each amendment.

[Statutory Authority: Chapter 70.45 RCW and RCW 70.44.007. WSR 98-14-056, § 246-312-035, filed 6/26/98, effective 7/27/98.]

WAC 246-312-040 Documents required. (1) The acquiring person shall submit as part of the application for approval three copies of the required documents to the Department of Health, Office of Health Systems Development, P.O. Box 47851, Olympia, Washington 98504-7851 and one copy to the Attorney General's Office, Antitrust Section, 900 4th Avenue, Suite 2000, Seattle, Washington 98164-1012. The official date of receipt shall be the date the application is received at the department of health.

(2) Each document submitted shall identify which request the document is responsive to, using the list below. If the requested document does not exist the acquiring party shall note "does not exist" on a page for that document.

(3) The acquiring party shall submit, or, as appropriate, obtain from the nonprofit hospital and then submit:

(a) The articles of incorporation of the nonprofit hospital, including all amendments thereto from inception to the present.

(b) The bylaws of the nonprofit hospital, including all amendments thereto from inception to the present.

(c) All documents reflecting the terms and conditions of any restricted gifts or bequests to the nonprofit hospital in excess of ten thousand dollars.

(d) A list identifying all trustees, officers and directors of the nonprofit hospital who have served at any time during the seven years prior to the application.

(e) A list identifying each and every officer, trustee or director of the nonprofit hospital (or any immediate family member of such persons) or any affiliate of the nonprofit who has any personal financial interest (other than salary and directors/trustees' fees) in any company, firm, partnership, or other business entity that is currently doing business, or has previously done business, with the nonprofit hospital or any affiliate of the nonprofit hospital or the acquiring person or any affiliate of the acquiring person.

(f) A statement summarizing the procedure which the nonprofit hospital's board of directors used to evaluate the proposed acquisition.

(g) All documents reflecting a decision by the board of directors of the nonprofit hospital to delegate to any committee, or group smaller than the entire board, the responsibility for reviewing or considering any potential change of ownership or control of the nonprofit's assets.

(h) All documents relating to discussions, deliberations or consideration by the nonprofit hospital's board of directors or any committee or individual members thereof of any possible change of ownership or control of the hospital's assets including the proposed acquisition and specific alternatives to the proposed acquisition.

(i) An affidavit from each member of the board of directors of the nonprofit hospital which contains a statement that the individual has no conflict of interest in the proposed acquisition or otherwise shall disclose any and all actual or potential individual conflicts of interest.

(j) Copies of the two most recent "community needs assessment" or similar evaluations or assessments prepared by or for the nonprofit hospital. Identify all individuals or

entities which assisted or contributed to any such evaluations or assessments.

(k) All documents relating to communications between the nonprofit hospital and any consultants retained to assist in the process of considering or deciding whether to enter into the proposed acquisition including any valuation of the assets involved in the proposed acquisition, retention letters or contracts, and any and all materials relied upon to support any conclusions as to valuation.

(l) All documents relating to any relationship between the nonprofit hospital and valuation consultant.

(m) The financial and economic analysis and report from an independent consultant relating to the proposed acquisition and the supporting documents which form the basis for this report, and any other documentation reflecting valuation determinations of any of the nonprofit hospital's assets that are subject to the proposed acquisition.

(n) Copies of all requests for proposal sent to any potential acquiring person and all responses received thereto by the nonprofit hospital.

(o) All documents relating to the reasons why any potential acquiring person was excluded by the nonprofit hospital from further consideration as a potential acquiring person of the assets involved in the proposed acquisition.

(p) All documents reflecting the deliberative process used by the nonprofit hospital in selecting the acquiring person.

(q) Copies of each proposal received by the nonprofit hospital and documents which reflect any analysis thereof. Identify all analysts involved.

(r) All documents relating to the nonprofit hospital's board of directors' evaluation of the option of continuing as a nonprofit entity or pursuing the proposed acquisition or similar transaction with another nonprofit entity.

(s) All documents relating to the nonprofit hospital's plan for use of any proceeds after close of the proposed acquisition together with a statement explaining how the proposed plan complies with all applicable charitable trusts that govern use of the nonprofit hospital's assets. The plan must include any proposed amendments to the nonprofit hospital's articles of incorporation and bylaws or any articles of incorporation and bylaws of any entity that will control any of the proceeds from the proposed transfer. Attach any Internal Revenue Service opinions related to the above.

(t) A statement from the nonprofit hospital's board of directors which contains all the reasons for the board's conclusion that the proposed acquisition is necessary or desirable and is appropriate under the circumstances, and which contains the board's conclusions regarding the effects which the proposed acquisition will likely have on delivery of health related services to the community served by each facility involved in the proposed acquisition, and the basis for this opinion. The statement shall also describe all dissenting viewpoints presented.

(u) Copies of the prior five annual audited financial statements and the most current unaudited financial statement for the nonprofit hospital.

(v) A detailed statement of any actual or contingent liabilities retained by the nonprofit hospital posttransaction.

(w) All requests for opinions to the Internal Revenue Service for rulings related to the proposed acquisition and any Internal Revenue Service responses thereto.

(x) A pro forma balance sheet for the surviving or successor nonprofit entity posttransaction.

(y) A statement describing how the survivor or the successor nonprofit entity plans to deal with the right of first refusal to repurchase the assets involved in this transaction, along with a copy of any proposed contract, agreement or understanding regarding the same.

(z) A detailed statement describing how representatives of the community will be involved in the governance of the successor nonprofit entity.

(aa) A statement containing any other information the nonprofit hospital believes the attorney general should consider in deciding whether the proposed acquisition is in the public interest.

(bb) All proposed written agreements or contracts between the nonprofit hospital and the acquiring person relating to the proposed acquisition.

(cc) All documents relating to any personal financial benefit that the proposed acquisition may confer on any officer, director, trustee, employee, doctor, medical group, consultant, or any other entity affiliated with the nonprofit hospital or any immediate family member of any such person.

(dd) All documents relating to any relationship between the acquiring person and valuation consultant.

(ee) Copies of any proposed contract, agreement or understanding relating to the proposed acquisition between the acquiring person and any officer, director, trustee, consultant, or committee member of the nonprofit hospital, or consultants thereto, or any other party to the acquisition.

(ff) A detailed statement and all documents relating to the parties' plans to ensure the community's continued access to affordable health care posttransaction and plans regarding any anticipated reduction or elimination of any health services posttransaction and the availability of alternative services should such elimination or reduction occur.

(gg) A detailed statement and all documents relating to the parties' plans for assuring the continuance of existing hospital privileges posttransaction.

(hh) A detailed statement and all documents relating to the parties' plans for ensuring the maintenance of appropriate health science research and health care provider education posttransaction.

(ii) A detailed statement and all documents relating the parties' plans for ensuring safeguards to avoid conflict of interest in posttransaction patient referral.

(jj) A detailed statement and all documents relating to the parties' commitment and plans to provide health care to the disadvantaged, the uninsured, and the underinsured and how benefits to promote improved health in the affected community will be provided posttransaction.

(4) The attorney general and the department of health reserve the right to request additional information and documents as deemed reasonably necessary to determine compliance with chapter 70.45 RCW, the Nonprofit Hospital Sales Act.

[Statutory Authority: Chapter 70.45 RCW and RCW 70.44.007. WSR 98-14-056, § 246-312-040, filed 6/26/98, effective 7/27/98.]

PART III - REVIEW PROCESS

WAC 246-312-050 Criteria the department will use for review. (1) Chapter 70.45 RCW states that the department may not approve an application unless, at a minimum, it determines that:

(a) The acquisition is permitted under chapter 24.03 RCW, the Washington Nonprofit Corporation Act, and other laws governing nonprofit entities, trusts, or charities;

(b) The nonprofit corporation that owns the hospital being acquired has exercised due diligence in authorizing the acquisition, selecting the acquiring person, and negotiating the terms and conditions of the acquisition;

(c) The procedures used by the nonprofit corporation's board of trustees and officers in making its decision fulfilled their fiduciary duties, that the board and officers were sufficiently informed about the proposed acquisition and possible alternatives, and that they used appropriate expert assistance;

(d) There is no conflict of interest related to the acquisition, including, but not limited to, board members and executives of, and experts retained by, the nonprofit corporation, acquiring person, or other parties to the acquisition;

(e) The nonprofit corporation will receive fair market value for its assets. The attorney general or the department may employ reasonably necessary expert assistance in making this determination. The acquiring person is responsible for any cost of this expert assistance, in addition to the fees charged under WAC 246-312-990;

(f) If the acquisition is financed in part by the nonprofit corporation, that charitable funds will not be placed at unreasonable risk;

(g) Any management contract under the acquisition is for fair market value;

(h) The proceeds from the acquisition will be controlled as charitable funds independently of the acquiring person or parties to the acquisition, and will be used for charitable health purposes consistent with the nonprofit corporation's original purpose. Charitable health purposes include providing health care to the disadvantaged, the uninsured, and the underinsured, and providing benefits to promote improved health in the affected community;

(i) The charitable entity established to hold the proceeds of the acquisition will be broadly based in, and representative of, the community where the hospital to be acquired is located, taking into consideration the structure and governance of such entity; and

(j) If the hospital is subsequently sold to, acquired by, or merged with another entity that a right of first refusal to repurchase the assets by a successor nonprofit corporation or foundation has been retained.

(2) Based on chapter 70.45 RCW, the department shall not approve an application unless, at a minimum, it determines that:

(a) If the acquisition results in a reduction or elimination of particular health services, that sufficient safeguards are included to assure the affected community has continued access to affordable care, and that alternative sources of care are available in the community;

(b) Hospital privileges will not be revoked;

(c) Sufficient safeguards are included to maintain appropriate capacity for health science research and health care provider education;

(d) The parties to the acquisition are committed to providing health care to the disadvantaged, the uninsured, and the underinsured and to providing benefits to promote improved health in the affected community; and

(e) Sufficient safeguards are included to avoid conflict of interest in patient referral.

(3) The department may only approve an acquisition if it also determines that the acquisition will not detrimentally affect the continued existence of accessible, affordable health care that is responsive to the needs of the community where the hospital being acquired is located.

[Statutory Authority: Chapter 70.45 RCW and RCW 70.44.007. WSR 98-14-056, § 246-312-050, filed 6/26/98, effective 7/27/98.]

WAC 246-312-060 Timelines for review. (1) For good cause, the department of health or the attorney general may request a one-time, thirty-day extension to each timeline.

(2) The department, in consultation with the attorney general, will determine if an application is complete within fifteen working days of the receipt of the application package, documents and required fee(s). If a determination is made that the application is incomplete, the applicant will be notified of the reasons the application is incomplete, with reference to the particular deficiencies.

(3) The department will publish a notice of the application in the newspaper(s) in the county or counties where the hospital is located within five working days of receiving a completed application. The department will notify any person who has requested to receive such notices. The notice shall contain:

(a) Information about the parties to the acquisition;

(b) Where and when to send comments to the department; and

(c) Other information required for adequate public notice of the transaction and the department's review.

(4) Within forty-five days of the first public hearing, the attorney general will provide a written opinion to the department as to whether the acquisition meets the requirements for approval as required by chapter 70.45 RCW.

(5) Within thirty days of receiving the written opinion from the attorney general, the department will:

(a) Approve the acquisition, with or without any specific modification or conditions; or

(b) Disapprove the acquisition.

[Statutory Authority: Chapter 70.45 RCW and RCW 70.44.007. WSR 98-14-056, § 246-312-060, filed 6/26/98, effective 7/27/98.]

WAC 246-312-070 Public hearing. (1) The department will hold at least one public hearing in the county where the hospital being acquired is located. Any person may provide written or oral testimony. The department reserves the right to limit the time each presenter may have to make an oral statement.

(2) The department may subpoena witnesses or information, administer oaths, take depositions, and use related discovery procedures.

[Statutory Authority: Chapter 70.45 RCW and RCW 70.44.007. WSR 98-14-056, § 246-312-070, filed 6/26/98, effective 7/27/98.]

PART IV - ACQUISITION APPROVAL OR DISAPPROVAL

WAC 246-312-080 Grounds for approval, disapproval or modification of an acquisition. (1) The department's decision must be based on the requirements of chapter 70.45 RCW. Any condition or modification must have a direct and rational relationship to the application under review.

(2) The written opinion of the attorney general may not constitute a final decision for purposes of review.

(3) The department will only approve an application if the parties to the acquisition have taken the proper steps to safeguard the value of charitable assets and to ensure that any proceeds from the acquisition are used for appropriate charitable health purposes.

[Statutory Authority: Chapter 70.45 RCW and RCW 70.44.007. WSR 98-14-056, § 246-312-080, filed 6/26/98, effective 7/27/98.]

WAC 246-312-090 Appeals. The acquiring person or nonprofit hospital may appeal a decision made by the department of health under the Administrative Procedure Act (chapter 34.05 RCW).

[Statutory Authority: Chapter 70.45 RCW and RCW 70.44.007. WSR 98-14-056, § 246-312-090, filed 6/26/98, effective 7/27/98.]

PART V - COMPLIANCE WITH DEPARTMENT'S DECISION

WAC 246-312-100 Compliance with the terms of the acquisition and the department's decision. (1) At the time of the final decision, the department will notify the parties to the acquisition whether the nonprofit hospital, the acquiring party, or both, must submit periodic reports detailing how commitments made are being adhered to. The frequency of the reports will also be determined at that time, and will not be more frequent than semiannually but no less frequent than every three years.

(2) Any person, whether a party of the initial acquisition or not, may submit information concerning whether the acquiring person is fulfilling the terms of the acquisition and the department's approval or conditions. If the department determines there is reasonable cause to believe that the information indicates failure to comply, a public hearing will be held. The department must give at least ten days' written notice to the affected parties, including the local community affected.

(3) The cost of the public hearing and any on-site reviews related to determining the validity of the allegations will be borne by the acquiring parties.

(4) If the department finds that the parties to the acquisition have failed to adhere to their commitments or the conditions of the department's approval, the department may:

(a) Revoke or suspend the hospital license pursuant to RCW 70.41.130;

(b) Refer the matter to the attorney general for appropriate action; or

(c) Both.

(5) The attorney general may seek a court order compelling the acquiring person to fulfill its commitments under chapter 70.45 RCW.

(6/26/98)

(6) The attorney general has the authority to ensure compliance with commitments that inure to the public interest. No provision of chapter 70.45 RCW, derogates from the common law or statutory authority of the attorney general.

[Statutory Authority: Chapter 70.45 RCW and RCW 70.44.007. WSR 98-14-056, § 246-312-100, filed 6/26/98, effective 7/27/98.]

WAC 246-312-200 Public health care service district (also known as public hospital district). (1) Prior to approving the acquisition of a public health care service district hospital, the district board of commissioners must obtain a written opinion from a qualified independent expert or the department of health as to whether or not the acquisition meets the review criteria in RCW 70.45.080.

(2) If requested by the district to conduct a review, the department will charge the district for the review costs as provided in the fee schedule (WAC 246-312-990).

(3) The department will deliver its opinion within ninety days of the district's request.

[Statutory Authority: Chapter 70.45 RCW and RCW 70.44.007. WSR 98-14-056, § 246-312-200, filed 6/26/98, effective 7/27/98.]

WAC 246-312-990 Fees. (1) The department will assess on the acquiring party a nonrefundable application processing fee, a review fee and other charges as authorized in chapter 332, Laws of 1997. The fees shall consist of the following:

| Processing Fees | Nonrefundable Processing Fee |
|--|-------------------------------------|
| Each New Application will be subject to a | \$1,000 |
| Each Amendment to an application undergoing review will be subject to a | \$500 |
| Type of Acquisition Description | Review Fee |
| Acquisition of 20% or more of the assets of the hospital | \$40,000 |
| Change in current ownership position that results in acquiring party holding or controlling 50% or more of the hospital assets | \$50,000 |
| Any Other Change in Ownership | \$60,000 |
| Amendment to an approved Change of Ownership | \$15,000 |
| Other Fees (When Applicable) | Fee Amount |
| Exemption Determinations | \$250 |
| Fair Market Value Determination- Nonrefundable | \$ Based on Contracted Amount |
| Public Health Services District-Voluntary Review | \$ To be billed at Cost |
| On-Site Compliance Visit- Nonrefundable | \$ To be billed at Cost |

| Other Fees (When Applicable) | Fee Amount |
|---|---|
| Attorney General Opinion-Non-refundable | \$ As billed to the department by the attorney general's office |

(2) When an applicant submits a written request to withdraw an application, the department shall refund the review fee using the following schedule:

| Time Period For Requesting Withdrawal of Application | Amount of Review Fee to be Refunded |
|--|--|
| Within 10 working days after receipt of the completed application | 100% |
| Between the 11th working day and the 45th working day after receipt of the completed application | 50% |
| After the 45th working day | 0% |

(3) Fees for the fair market value determination shall be paid in addition to the applicable processing and application review fees. These fees shall be based on the contracted amount for consultants with the expertise to make such an evaluation. The acquiring party is responsible for this payment. If payment of this fee is not made within ten working days following being billed, the review of the application shall be suspended until payment is made.

(4) Fees for the public health services district voluntary review shall be paid by the public health services district. These fees shall be billed at cost and must be paid within ten working days of being billed.

(5) Fees for the attorney general's opinion shall be paid in addition to the applicable processing and application review fees. These fees shall be based on the charges billed to the department and then billed to the acquiring party. Fees must be paid within ten working days of being billed or the review of the application shall be suspended until payment is made.

[Statutory Authority: 1997 c 332 § 14. WSR 97-21-052, § 246-312-990, filed 10/13/97, effective 11/13/97.]