

MAINE STATE LEGISLATURE

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L.D. 1770

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STATE OF MAINE
HOUSE OF REPRESENTATIVES
120TH LEGISLATURE
SECOND REGULAR SESSION

COMMITTEE AMENDMENT "A" to H.P. 1307, L.D. 1770, Bill, "An Act Regarding Conversions of Nonprofit Entities to For-profit Entities"

Amend the bill by striking out the title and substituting the following:

'An Act Regarding Public Charities, Nonprofit Corporations and Conversions of Nonprofit Entities to For-profit Entities'

Further amend the bill by striking out everything after the enacting clause and before the summary and inserting in its place the following:

PART A

Sec. A-1. 5 MRSA §194 is repealed and the following enacted in its place:

§194. Public charities

1. Definition. As used in this section, "public charity" means an entity formed primarily for charitable purposes, including but not limited to:

A. A corporation formed under Title 13 or Title 13-B

2 primarily for charitable purposes; and

4 B. A charitable trust.

6 2. Application; funds. The Attorney General shall enforce
8 due application of funds given or appropriated to public
charities within the State and prevent breaches of trust in the
administration of public charities.

10 3. Gift. A gift to a public charity made for a public
12 charitable purpose is deemed to have been made with a general
intention to devote the property to public charitable purposes,
14 unless otherwise provided in writing in the gift instrument.

16 4. Party to proceedings. The Attorney General must be made
18 a party to all judicial proceedings in which the Attorney General
is interested in the performance of the Attorney General's duties
under subsection 2.

20 5. Investigation. The Attorney General may conduct an
22 investigation using the methods set forth in subsections 6 and 7
if:

24 A. The Attorney General reasonably believes that a public
26 charity has engaged or is about to engage in one of the
following acts or practices:

28 (1) Consummation of a conversion transaction as
30 defined in section 194-B without compliance with the
applicable provisions of sections 194-C through 194-H;
32 or

34 (2) The application of funds or assets of a public
charity:

36 (i) In violation of statute;

38 (ii) For noncharitable purposes unrelated to the
40 operations of the public charity; or

42 (iii) For private inurement or excess benefits
44 provided to directors, officers, disqualified
persons or others deemed insiders under applicable
federal law for tax-exempt organizations; and

46 B. The Attorney General has applied to a Justice of the
48 Superior Court for approval to conduct the investigation and
the justice has granted that approval. The application for
approval may be filed ex parte, and the justice shall

2 approve the application if the justice finds that the
3 conditions set forth in paragraph A have been met.

4 6. Scope and powers related to investigation. The
5 authority of the Attorney General to conduct an investigation
6 under this section is limited to investigation of the acts or
7 practices described in subsection 5, paragraph A. In conducting
8 the investigation, the Attorney General has authority to:

10 A. Take testimony under oath;

12 B. Examine or cause to be examined any documentary material
13 of whatever nature relevant to such acts or practices; and

14 C. Require attendance during examination of documentary
15 material under paragraph B of any person having knowledge of
16 the documentary material and take testimony under oath or
17 acknowledgement in respect to that documentary material.

20 7. Taking testimony; examining documents. The taking of
21 testimony and examination under subsection 6 must take place in
22 the county where the testifying person resides or has a place of
23 business or, if the parties consent or the testifying person is a
24 nonresident or has no place of business within the State, in
25 Kennebec County.

26 A. Notice of the time, place and cause of the taking of
27 testimony, examination or attendance under this subsection
28 must be given by the Attorney General at least 30 days prior
29 to the date of the taking of testimony or examination,
30 except that, upon application and good cause shown, a
31 Justice of the Superior Court may order a shorter period of
32 notice, but not less than 10 days.

34 B. Service of a notice under paragraph A may be made by:

36 (1) Delivering a duly executed copy of the notice to
37 the person to be served or to a partner or to any
38 officer or agent authorized by appointment or by law to
39 receive service of process on behalf of that person;

42 (2) Delivering a duly executed copy of the notice to
43 the principal place of business in this State of the
44 person to be served; or

46 (3) Mailing by registered or certified mail a duly
47 executed copy of the notice, addressed to the person to
48 be served, to the person's principal place of business.

50 C. Each notice under this subsection must:

2 (1) State the time and place for the taking of
4 testimony or the examination and the name and address
6 of each person to be examined, if known, and, if the
 name is not known, a general description sufficient to
 identify the person;

8 (2) State the general subject matter of the
10 investigation, the alleged violation that is under
 investigation and the title and section of statute, if
 any, governing the alleged violation;

12 (3) Describe the class or classes of documentary
14 material to be produced with reasonable specificity to
 fairly indicate the material demanded;

16 (4) Prescribe a return date by which the documentary
18 material must be produced; and

20 (5) Identify the members of the Attorney General's
22 staff to whom the documentary material must be made
 available for inspection and copying.

24 D. A notice to produce documentary information or to give
26 testimony under this subsection may not contain a
 requirement that would be unreasonable if contained in a
28 subpoena duces tecum issued by a court of the State and may
30 not require the disclosure of any documentary material that
 would be privileged or that for any other reason would not
 be required by a subpoena duces tecum issued by a court of
 the State.

32 E. Any documentary material or other information produced
34 by a person pursuant to this subsection and subsection 6 may
36 not, unless otherwise ordered by a court of the State for
 good cause shown, be disclosed to a person other than are
38 authorized agent or representative of the Attorney General
 unless with the consent of the person producing the
 documentary material.

40 F. The Superior Court for Kennebec County or a Superior
42 Court in any other county in which a person who is served
44 notice pursuant to this section resides or has that person's
46 usual place of business may issue orders concerning
 compliance with the notice, modification or quashing of the
48 notice and contempt in the same manner as if the notice were
 a subpoena governed by Rule 45 of the Maine Rules of Civil
 Procedure. The recipient of a notice under this section has
50 the protections accorded by Rule 45 to a person who is
 subject to a subpoena.

2 8. Authority regarding conversion proceedings. If a public
3 charity files notice of a conversion transaction under section
4 194-D or applies for approval of such a transaction under section
5 194-E or 194-F, the authority of the Attorney General with regard
6 to the notice or approval and the proceedings for approval are
7 governed by sections 194-B to 194-K and the provisions of this
8 section do not apply.

10 9. Notice to the Superintendent of Insurance. If the
11 Attorney General intends to conduct an investigation of a public
12 charity that is subject to regulation by the Superintendent of
13 Insurance, the Attorney General shall notify the superintendent
14 that an investigation is being initiated. The Attorney General
15 shall also notify the superintendent of the resolution of any
16 such investigation.

18 **Sec. A-2. 5 MRSA §§194-B to 194-K** are enacted to read:

20 **§194-B. Definitions**

22 As used in this section and sections 194-C to 194-K, unless
23 the context otherwise indicates, the following terms have the
24 following meanings.

26 1. Control. "Control" means the possession, direct or
27 indirect, of the power to direct or cause the direction of the
28 management and policies of an individual, whether through the
29 ownership of voting securities, by contract other than a
30 commercial contract for goods or nonmanagement services or
31 otherwise, including but not limited to situations in which the
32 power is the result of an official position with the person or a
33 corporate office held by an individual.

34 2. Conversion transaction. "Conversion transaction" means
35 the sale, transfer, lease, exchange, transfer by exercise of an
36 option, conveyance, conversion, merger or other disposition or
37 the transfer of control or governance of the assets or operations
38 of a public charity to a person other than a public charity
39 incorporated or domiciled in this State. A disposition or
40 transfer constitutes a conversion transaction regardless of
41 whether it occurs directly or indirectly and whether it occurs in
42 a single transaction or a related series of transactions. If
43 exercise of an option constitutes a conversion transaction, any
44 consideration received for the granting of the option must be
45 considered part of the transaction for purposes of applying the
46 review criteria in section 194-G. "Conversion transaction" does
47 not include a transaction that supports or continues the
48 charitable activities of the public charity, including but not
49 limited to:

2 A. Granting of encumbrances in the ordinary course of
3 business, such as security interests or mortgage deeds with
4 respect to assets owned by the public charity or any wholly
5 owned subsidiary to secure indebtedness for borrowed money,
6 the net proceeds of which are paid solely to the public
7 charity or its wholly owned subsidiaries or are applied to
8 the public charity's charitable mission, and the foreclosing
9 or other exercise of remedies permitted with respect to such
10 encumbrances;

12 B. Sales or transfers for fair market value of:

14 (1) Any interest in property owned by the public
15 charity or any wholly owned subsidiary, the net
16 proceeds of which are paid solely to the public charity
17 or any wholly owned subsidiary; or

18 (2) Money or monetary equivalents owned by a public
19 charity or any wholly owned subsidiary in exchange for
20 an interest in property, including securities as
21 defined in Title 32, section 10501, subsection 18, to
22 be held by the public charity or any wholly owned
23 subsidiary;

26 C. Awards, grants or payments to or on behalf of intended
27 beneficiaries, consistent with the public charity's
28 charitable purpose; and

30 D. A change in the membership of the board of directors or
31 officers of a public charity.

32 3. Fair market value. "Fair market value" means the most
33 likely value or range of values that assets, tangible or
34 intangible, being sold would have in a competitive and open
35 market under all conditions requisite to a fair sale, with the
36 buyer and seller each acting prudently, knowledgeably and in
37 their own best interest and a reasonable time being allowed for
38 exposure in the open market. If the value of the assets being
39 converted is \$500,000 or more, the appraisal must include a value
40 representing volunteer efforts and tax exemptions, if any,
41 received during the operation of the public charity.

44 4. Independent appraisal of the fair market value.
45 "Independent appraisal of the fair market value" means an
46 appraisal conducted by persons independent of all parties to a
47 proposed conversion transaction and experienced and expert in the
48 area of appraisal of the type and form of property being valued.
49 The appraisal must be conducted using professionally accepted
50 standards for the type and form of property being valued. The

2 appraisal must contain a complete and detailed description of the
3 elements that make up the appraisal values produced and detailed
4 support for the conclusions reached in the appraisal.

5 5. Person. "Person" means an individual, partnership,
6 trust, estate, corporation, association, joint venture, joint
7 stock company or other organization.

8
9 6. Public charity. "Public charity" has the same meaning
10 as in section 194.

11 **§194-C. Notice and approval for conversion transaction**

12
13 1. Notice or approval required. Prior to completing a
14 conversion transaction, a public charity must:

15
16 A. If the fair market value of assets to be converted in
17 the transaction is \$500,000 or more, obtain approval of the
18 court in accordance with section 194-F;

19
20 B. If the fair market value of assets to be converted in
21 the transaction is less than \$500,000 but at least \$50,000,
22 obtain approval from the Attorney General in accordance with
23 section 194-E or, if the Attorney General does not approve
24 the transaction, obtain approval from the court in
25 accordance with section 194-F; or

26
27 C. If the value of the transaction is less than \$50,000,
28 provide notice to the Attorney General in accordance with
29 section 194-D.

30
31 2. Appraisal required. Fair market value must be
32 determined by an independent appraisal for conversion
33 transactions with a fair market value of \$50,000 or more. If the
34 appraisal provides a range of values, the highest point of the
35 range determines which section of law applies to the transaction
36 pursuant to subsection 1.

37
38 3. Failure to comply with this section or sections 194-D to
39 194-H. A transaction consummated in violation of any provision
40 of this section or sections 194-D to 194-H is voidable. Officers
41 and directors who receive private inurement or excess benefits
42 from such a transaction are subject to the civil penalties
43 provided in section 194-K.

44
45 4. Applicability to nonprofit hospital or medical service
46 organizations. This section, section 194-B and sections 194-D to
47 194-K do not apply to a corporation or other entity licensed
48 under Title 24, chapter 19. A conversion of a corporation or

other entity licensed under Title 24, chapter 19 is governed by section 194-A and Title 24, section 2301, subsection 9-D.

§194-D. Conversion transactions less than \$50,000

A public charity shall provide written notice to the Attorney General of its intent to enter into a conversion transaction if the value of the transaction is less than \$50,000. The notice must include the name of the public charity, the value of the assets to be converted and the entity to which the assets will be transferred. Twenty days after providing notice to the Attorney General in accordance with this section, the public charity is deemed to be in compliance with section 194-C and this section unless the Attorney General notifies the public charity within those 20 days that the value of the transaction is \$50,000 or more or that the filing otherwise fails to comply with this section.

The Attorney General is not required to take any action on notices received under this section, except that, upon request of a public charity that has properly provided notice under this section, the Attorney General shall issue a letter indicating that the public charity has complied with its obligation under this section, section 194-C and sections 194-E to 194-H.

§194-E. Attorney General approval without court review

1. Filing with Attorney General. To obtain approval of a conversion transaction when the independent appraisal of the fair market value of the assets to be converted is \$50,000 or more but is less than \$500,000, a public charity must file a written request for approval with the Attorney General at least 90 days prior to consummating the transaction. The written request must include a conversion plan, a plan for distributing proceeds of the conversion consistent with section 194-H and any other information reasonably necessary for the Attorney General to complete a review of the transaction. Failure to provide the information described in this subsection in a timely manner is sufficient grounds for the Attorney General to refuse to approve the transaction.

2. Attorney General approval. The Attorney General shall approve a conversion transaction under subsection 1 if the Attorney General determines that the criteria set forth in section 194-G have been met. The Attorney General shall refuse to approve a transaction if the Attorney General reasonably believes that the fair market value of the transaction is \$500,000 or more.

2 3. Public notice. Within 5 days of filing the request for
3 approval under subsection 1, a public charity shall publish
4 notice to the public of its intent to enter into a conversion
5 transaction. Notice must be published once per week for 3 weeks
6 in a newspaper of general circulation in the public charity's
7 service area and must meet the following criteria.

8 A. A notice under this subsection must describe the
9 proposed transaction, including the parties, the value of
10 the transaction, the timing of the transaction, the
11 potential impact on services to the public and the proposed
12 plan for utilizing the proceeds. The public notice must
13 also provide information on opportunities for the public to
14 provide comment on the proposal to the Attorney General.

15 B. A notice under this subsection must be published in
16 languages other than English whenever a significant number
17 or percentage of the population eligible to be served or
18 likely to be directly affected by the service or purpose of
19 the public charity needs information in a language other
20 than English to communicate effectively. For the purposes
21 of this paragraph, "significant number" is defined as 5% or
22 1,000, whichever is less, of the population of persons
23 eligible to be served or likely to be directly affected.

24 4. Public comment. The Attorney General shall accept
25 public comments regarding a proposed conversion transaction under
26 this section for a 60-day period commencing the day that proper
27 notice has been provided to the public of the proposed conversion.
28

29 5. Public hearings. The Attorney General may hold public
30 hearings if the Attorney General determines that a conversion
31 transaction under this section is likely to cause a significant
32 impact on access to services in the community served by the
33 public charity.
34

35 6. Public records. All documents submitted to the Attorney
36 General by a person filing a request under subsection 1 in
37 connection with the Attorney General's review of a proposed
38 conversion transaction are public records subject to Title 1,
39 chapter 13, subchapter I except records made confidential by
40 statute or privileged under the Maine Rules of Evidence.
41

42 7. Attorney General rejection of or failure to act on
43 request for approval. If the Attorney General refuses to approve
44 a conversion transaction under this section or fails to act on
45 the request for approval within 90 days of receipt of the
46 request, a public charity may request court approval of the
47 transaction under section 194-F.
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2 8. Contracts with consultants; reimbursement for costs. To
3 assist in the review of a proposed conversion transaction
4 pursuant to this section, the Attorney General, at the Attorney
5 General's sole discretion, may contract with experts or
6 consultants the Attorney General considers appropriate.

7
8 A. Contract costs incurred by the Attorney General pursuant
9 to this subsection may not exceed an amount that is
10 reasonable and necessary to conduct the review of a proposed
11 conversion transaction. A public charity filing a request
12 under subsection 1 shall pay the Attorney General promptly
13 upon request for all costs of contracts entered into by the
14 Attorney General pursuant to this subsection but is not
15 required to pay any amount that exceeds 5% of the fair
16 market value of the assets to be converted.

17
18 B. The Attorney General is exempt from the provisions of
19 applicable state laws regarding public bidding procedures
20 for purposes of entering into contracts pursuant to this
21 subsection.

22 **§194-F. Court approval**

23
24 1. Filing of court action. To obtain approval of a
25 conversion transaction when the independent appraisal of the fair
26 market value of the assets to be converted is \$500,000 or more, a
27 public charity must file an action in Superior Court in the
28 county in which the public charity's service area is located or
29 in Kennebec County. Concurrent with filing an action in Superior
30 Court, a public charity must file with the court and the Attorney
31 General a conversion plan and a plan for distributing proceeds of
32 the conversion consistent with section 194-H. The Attorney
33 General must be made a party to the action.

34
35 2. Court action. The court shall approve a proposed
36 conversion transaction under subsection 1 if the court finds by a
37 preponderance of the evidence that the criteria set forth in
38 section 194-G have been satisfied. The court may deny approval
39 of a conversion transaction or may approve the transaction with
40 or without modifications or conditions. The court may require
41 any entity that receives the assets of the public charity as a
42 result of the conversion to report annually to the Attorney
43 General and the public and may require the entity to submit to
44 monitoring and oversight by the Attorney General.

45
46 3. Public notice. Within 5 days of filing an action under
47 subsection 1, a public charity shall publish notice to the public
48 of its intent to enter into a conversion transaction. Notice
must be published once per week for 3 weeks in a newspaper of

2 general circulation in the charity's service area and must meet
3 the following criteria.

4 A. A notice under this subsection must describe the
5 proposed transaction, including the parties, the value of
6 the transaction, the timing of the transaction, the
7 potential impact on services to the public and the proposed
8 plan for utilizing the proceeds. The public notice must
9 also include the court docket number and provide information
10 on opportunities for the public to provide comment on the
11 proposal to the Attorney General.

12 B. The notice must be published in languages other than
13 English whenever a significant number or percentage of the
14 population eligible to be served or likely to be directly
15 affected by the service or purpose of the public charity
16 needs information in a language other than English to
17 communicate effectively. For purposes of this paragraph,
18 "significant number" is defined as 5% or 1,000, whichever is
19 less, of the population of persons eligible to be served or
20 likely to be directly affected.

21 **4. Public access to conversion plan.** The Attorney General
22 shall make a conversion plan, the plan for distribution of
23 proceeds, the valuation and any other documents filed under
24 subsection 1 that are public records under Title 1, chapter 13,
25 subchapter I and that are available electronically available for
26 viewing on the Attorney General's publicly accessible site on the
27 Internet as soon as feasible after the documents are filed with
28 the Attorney General.

29 **5. Contracts with consultants; reimbursement for costs.** To
30 assist in the review of a proposed conversion transaction
31 pursuant to this section, the Attorney General, at the Attorney
32 General's sole discretion, may contract with experts or
33 consultants the Attorney General considers appropriate.

34 A. Contract costs incurred by the Attorney General pursuant
35 to this subsection may not exceed an amount that is
36 reasonable and necessary to conduct the review of the
37 proposed conversion transaction. Costs must be approved in
38 advance by the court. The public charity filing an action
39 under subsection 1 shall pay the Attorney General promptly
40 upon request for all costs of contracts entered into by the
41 Attorney General and approved by the court pursuant to this
42 subsection.

43 B. The Attorney General is exempt from the provisions of
44 applicable state laws regarding public bidding procedures

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for purposes of entering into contracts pursuant to this subsection.

6. Filing with Secretary of State. A public charity shall file a copy of the court's approval under this section with the Secretary of State.

§194-G. Review criteria

1. Required determinations. The Attorney General may not approve or recommend that a court approve and the court may not approve a proposed conversion transaction unless the Attorney General or the court, as appropriate, finds that:

A. The public charity will receive fair market value for its charitable assets. The fair market value must be based upon an appraisal conducted in accordance with subsection 3 and must use the projected closing date of the conversion transaction as the valuation date;

B. The proposed distribution of proceeds of the transaction complies with section 194-H; and

C. The public charity considered the proposed conversion as the best alternative in carrying out its mission and purposes.

2. Considerations. In determining whether the criteria in subsection 1 are met, the Attorney General or the court, as appropriate, shall consider, as applicable, whether:

A. The public charity will receive fair market value for its charitable assets;

B. The terms and conditions of the agreement or transaction are fair and reasonable to the public charity;

C. The fair market value of the public charity's assets to be transferred has been manipulated by the actions of the parties in a manner that causes the fair market value of the assets to decrease;

D. The agreement or transaction will result in inurement to any private person or entity;

E. The proposed conversion transaction will result in a breach of fiduciary duty or violate any statutory or common-law duty or obligation on the part of the directors, trustees or other parties involved in the transaction, including but not limited to conflicts of interest related

2 to payments or benefits to officers, directors, board
3 members, executives and experts employed or retained by the
4 parties;

5 F. The governing body of the public charity exercised due
6 diligence in deciding to dispose of the public charity's
7 assets, selecting the acquiring entity and negotiating the
8 terms and conditions of the disposition;

9 G. The Attorney General has been provided with sufficient
10 information and data by the public charity to evaluate
11 adequately the agreement or transaction and the effects of
12 the agreement or transaction on the public;

13 H. The proceeds of the conversion of the public charity are
14 distributed to either an existing or new public benefit
15 corporation or foundation pursuant to section 194-H;

16 I. The proceeds of the proposed conversion transaction will
17 be used in accordance with the rules of any trust under
18 which the assets were held by the public charity and the
19 proceeds will be controlled as funds independent of the
20 acquiring entity or entities related to the acquiring entity;

21 J. The entity surviving after the conversion transaction
22 will be financially viable and competently managed;

23 K. The transaction will diminish the availability and
24 accessibility of services to the affected community; and

25 L. The conversion plan and transaction complies with all
26 applicable laws including the Maine Nonprofit Corporation
27 Act and state tax code provisions.

28 **3. Valuation.** A public charity shall submit to the
29 Attorney General and the court an independent appraisal of the
30 fair market value of assets to be converted under subsection 1.
31 To the extent that the appraisal is based on a capitalization of
32 the pro forma income of the converted assets, the appraisal must
33 indicate the basis for determination of the income to be derived
34 from any proceeds of the sale of stock and demonstrate the
35 appropriateness of the earnings-multiple used, including
36 assumptions made regarding future earnings growth.

37 A. To the extent that an appraisal under this subsection is
38 based on the comparison of the capital stock of the
39 converted entity with outstanding capital stock of existing
40 stock entities offering comparable products, the existing
41 stock entities must be reasonably comparable to the
42 converting entity in terms of such factors as size, market
43 value, and other factors.

2 area, competitive conditions, profit history and expected
3 future earnings.

4 B. If the value of assets being converted is \$500,000 or
5 more, the appraisal must include any element of value
6 arising from the accomplishment or expectation of the
7 conversion transaction, including any value attributable to
8 projected operating efficiencies to result from the
9 conversion, net of the cost of changes to produce such
10 efficiencies.

11 C. If the Attorney General or the court determines that an
12 appraisal under this subsection is materially deficient or
13 substantially incomplete, the Attorney General or the court
14 may deem the entire conversion plan materially deficient or
15 substantially incomplete and reject or decline to further
16 process the application for conversion.

17 D. A converting entity shall submit to the Attorney General
18 and the court information demonstrating to the satisfaction
19 of the Attorney General or the court the independence and
20 expertise of any person preparing the appraisal or related
21 materials under this subsection.

22 E. An appraiser under this subsection may not serve as an
23 underwriter or selling agent under the same conversion plan
24 and an affiliate of an appraiser may not act as an
25 underwriter or selling agent unless procedures are followed
26 and representations and warranties made to ensure that an
27 appraiser is separate from the underwriter or selling agent
28 affiliate and the underwriter or selling agent affiliate
29 does not make recommendations or in any way have an impact
30 on the appraisal.

31 F. An appraiser may not receive any other fee except the
32 fee for services rendered in connection with the appraisal.

33 **§194-H. Distribution of proceeds**

34 1. Requirements. The proceeds of a conversion transaction
35 must be distributed to an existing or new foundation or public
36 benefit corporation that meets the following requirements.

37 A. The foundation or public benefit corporation must
38 operate pursuant to 26 United States Code, Section 501(c)(3)
39 or 501(c)(4), and, regardless of whether the foundation is
40 classified as a private foundation under 26 United States
41 Code, Section 509, the foundation or public benefit
42 corporation must operate in accordance with the restrictions

2 and limitations that apply to private foundations found in
3 26 United States Code, Sections 4941 to 4945.

4 B. The foundation or public benefit corporation and its
5 directors, officers and staff must be and remain independent
6 of the for-profit company and its affiliates. A person who
7 is an officer, director or staff member with influence over
8 a conversion decision of a public charity submitting a
9 conversion plan, at the time the plan is submitted or at the
10 time of the conversion transaction or within 5 years
11 thereafter, is not qualified to be an officer, director or
12 staff member of the foundation. A director, officer, agent
13 or employee of the public charity submitting the plan or the
14 foundation receiving the charitable assets may not benefit
15 directly or indirectly from the transaction.

16 C. A foundation or public benefit corporation must have or
17 establish formal mechanisms to avoid conflicts of interest
18 and to prohibit grants benefiting the for-profit corporation
19 or members of the board of directors and management of the
20 for-profit corporation.

22 **§194-I. Intervention in court proceeding**

23 This section relates to intervention in proceedings under
24 section 194-F.

25 1. Right to intervene. Except as provided in subsection 2,
26 the court, on timely application made pursuant to Rule 24(a) of
27 the Maine Rules of Civil Procedure, shall allow any person who is
28 interested in the outcome of a conversion proceeding to intervene
29 as a party to that proceeding, notwithstanding the presence of
30 the Attorney General in the action.

31 2. Court power to manage process. This section does not
32 limit the power of the court to manage its cases by limiting the
33 number of intervenors or by consolidating parties with similar
34 interests.

35 **§194-J. Attorney General authority**

36 1. Rules. The Attorney General may adopt rules the
37 Attorney General considers appropriate to implement this section,
38 sections 194-B to 194-I and section 194-K. Rules adopted
39 pursuant to this subsection are routine technical rules as
40 defined in chapter 375, subchapter II-A.

41 2. Attorney General authority not limited. This section,
42 sections 194-B to 194-I and section 194-K do not limit the
43 common-law authority of the Attorney General to protect
44 the public interest.

charitable trusts and charitable assets in this State. The penalties and remedies provided in section 194-K are in addition to and are not a replacement for any other civil or criminal action the Attorney General may take under common law or statute, including an action to rescind the conversion transaction or to obtain injunctive relief or a combination of injunctive relief and other remedies available under common law or statute.

§194-K. Penalties

1. Attorney General to bring action. The Attorney General may initiate an action in Superior Court to:

A. Void a conversion transaction pursuant to subsection 2. Such an action may be brought in Superior Court in Kennebec County or in the county in which the assets of the public charity to be transferred are located;

B. Seek a civil penalty against an individual pursuant to subsection 3. Such an action must be brought in the Superior Court of Kennebec County or in the county in which the individual resides; and

C. Obtain on behalf of the public charity the return or repayment of any property or consideration received as private inurement or an excess benefit in violation of Title 13-B standards.

2. Transaction voidable. The Superior Court may void a conversion transaction entered into in violation of applicable provisions of sections 194-C to 194-H. If the court voids the transaction, it may also grant any orders necessary to restore the public charity to its former position, including removing the board of the public charity or voiding contracts.

3. Penalties against individuals. An individual officer, director, trustee or manager in a position to exercise substantial influence over the affairs of a public charity is subject to a civil penalty if that person, in violation of the standards established under Title 13-B for conduct by directors or officers or for avoiding conflicts of interest:

A. Receives property or consideration from the public charity that constitutes private inurement; or

B. Receives excess benefits that exceed the fair market value of anything provided in return.

The civil penalty under this subsection may be an amount up to 100% of the excess benefit or private inurement received and may

be recovered in addition to costs and fees incurred by the Attorney General in bringing the action.

PART B

Sec. B-1. 5 MRSA §194-A, sub-§1, ¶K, as enacted by PL 1997, c. 344, §1, is amended to read:

K. "Nonprofit hospital and medical service organization" or "organization" means a corporation or other entity authorized by the superintendent or organized pursuant to Title 24 for the purpose of providing nonprofit hospital service plans within the meaning of Title 24, section 2301, subsection 1 and, nonprofit medical service plans within the meaning of Title 24, section 2301, subsection 2. ~~It does not include and~~ any organization that provides only nonprofit health care plans within the meaning of Title 24, section 2301, subsection 3 ~~or a health insurance affiliate as defined in Title 24, section 2308-A. Nothing in this section may be construed to change, limit or affect the charitable status or obligations of nonprofit health care service plans organized under Title 24, section 2301, subsection 3.~~

Sec. B-2. 24 MRSA §2301, sub-§9-D, ¶¶A and B, as enacted by PL 1997, c. 344, §4, are amended to read:

A. A nonprofit hospital and medical service organization or other entity authorized by the superintendent or organized pursuant to this chapter ~~for the purpose of providing nonprofit hospital service plans within the meaning of subsection 1 and nonprofit medical service plans within the meaning of subsection 2~~ may convert to a domestic stock insurer subject to the provisions of this subsection.

B. As used in this subsection, unless the context otherwise indicates, the following terms have the following meanings.

(1) "Charitable trust" has the meaning set forth in Title 5, section 194-A, subsection 1, paragraph C.

(2) "Charitable trust plan" means the plan submitted to the Attorney General pursuant to Title 5, section 194-A, subsection 5.

(3) "Conversion" means the process by which an organization, with the approval of the superintendent, converts to a domestic stock insurer pursuant to this subsection.

- 2 (4) "Conversion plan" means a written plan that sets
4 forth the provisions required by the superintendent,
6 that is filed with the superintendent pursuant to this
8 subsection, that sets forth a complete description of
the proposed conversion and that contains sufficient
detail to permit the superintendent to make the
findings required under this subsection.
- 10 (5) "Converted stock insurer" means the domestic stock
12 insurer resulting from a conversion pursuant to this
subsection.
- 14 (6) "Fair market value" means the value of an
16 organization or an affiliate or the value of the assets
18 of such an entity determined as if the entity had
20 voting stock outstanding and 100% of its stock were
22 freely transferrable and available for purchase without
restrictions. In determining fair market value,
consideration must be given to value as a going
concern, market value, investment or earnings value,
net asset value and a control premium, if any.
- 24 (7) "Member" means a member of the organization
26 entitled to vote under the articles or bylaws of the
organization.
- 28 (8) "Nonprofit hospital and medical service
30 organization" or "organization" means a corporation or
32 other entity authorized by the superintendent or
34 organized pursuant to this chapter for the purpose of
36 providing nonprofit hospital service plans within the
38 meaning of subsection 1 and, nonprofit medical service
40 plans within the meaning of subsection 2, ~~it does not
include and any organization that provides only
nonprofit health care plans within the meaning of
subsection 3 or a health insurance affiliate defined in
section 2308-A. Nothing in this section may be
construed to change, limit or affect the charitable
status or obligations of nonprofit health care plans
organized under subsection 3.~~
- 42 (9) "Statement of ownership interests and charitable
44 purposes" means the statement filed with the Superior
46 Court pursuant to Title 5, section 194-A, subsection 3.
- 48 (10) "Subscriber" means an individual who has
50 subscribed to one or more of the hospital, medical or
health care service plans or contracts offered or
issued by the organization or health insurance

affiliate as defined in section 2308-A through an individual or family policy or group policy.

Sec. B-3. Review of health care conversion law. The Superintendent of Insurance shall conduct the following review and submit legislation as follows.

1. The superintendent shall review statutory provisions relating to conversion of nonprofit hospital and medical services organizations to determine whether amendments are needed to ensure that the law has the appropriate impact on conversions conducted after the effective date of this Act. The superintendent shall deliver a brief report of findings to the joint standing committee of the Legislature having jurisdiction over insurance matters not later than January 1, 2003.

2. The superintendent shall submit legislation to the First Regular Session of the 121st Legislature not later than January 1, 2003 to clarify that 100% of the net proceeds of a charitable organization covered by the nonprofit health and medical services organization conversion law are deemed public assets and to make any other changes the superintendent considers appropriate.

PART C

Sec. C-1. 13 MRSA §987 is enacted to read:

§987. Applicability of Title 13-B

A corporation or other entity created pursuant to this Title or regulated by this Title is subject to Title 5, section 194 and sections 194-B to 194-K if it is a public benefit corporation under Title 13-B, section 1406.

Sec. C-2. 13 MRSA §3062 is repealed.

Sec. C-3. 13 MRSA §4101, sub-§3, as enacted by PL 1993, c. 371, §2, is amended to read:

3. Governing board. "Governing board" means the body responsible for the management of an institution or an institutional fund or a trustee or trustees of a charitable trust.

Sec. C-4. 13 MRSA §4101, sub-§6, as enacted by PL 1993, c. 371, §2, is repealed and the following enacted in its place:

6. Institutional fund. "Institutional fund" means a fund held for or by an institution for its exclusive use, benefit or purposes and includes a fund held by a trustee for one or more

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2 institutions or other charitable purposes in which no beneficiary
3 that is not an institution or charitable beneficiary has an
4 interest, other than possible rights that could arise upon
5 violation or failure of the purposes of the fund. "Institutional
6 fund" does not include a fund held or created by a town or other
7 municipality.

8 **Sec. C-5. 13 MRSA §4106**, as amended by PL 1997, c. 302, §1,
9 is further amended by adding at the end a new paragraph to read:

10 In the administration of the powers to appropriate
11 appreciation, to make and retain investments and to delegate
12 investment management of institutional funds, trustees of
13 charitable trusts are governed by the standards set forth in
14 Title 18-A, section 7-302.

15 **Sec. C-6. 13-B MRSA §102, sub-§8-A** is enacted to read:

16 **8-A. Mutual benefit corporation.** "Mutual benefit
17 corporation" means a mutual benefit corporation described in
18 section 1406 or a corporation formed as a mutual benefit
19 corporation pursuant to chapter 4.

20 **Sec. C-7. 13-B MRSA §102, sub-§10-A** is enacted to read:

21 **10-A. Public benefit corporation.** "Public benefit
22 corporation" means a public benefit corporation described in
23 section 1406 or a domestic corporation formed as a public benefit
24 corporation pursuant to chapter 4.

25 **Sec. C-8. 13-B MRSA §103, sub-§3**, as enacted by PL 1977, c.
26 525, §13, is amended to read:

27 **3. Class of corporations.** Subject to the provisions of
28 section 201, this Act ~~shall~~ does not apply to any class of
29 corporations, including, but not limited to, corporations subject
30 to Title 24, chapter 19 or Title 24-A, to the extent that any
31 provision of any other public law is specifically applicable to
32 such class of corporations and is inconsistent with any provision
33 of this Act, in which case such other provision ~~shall prevail;~~
34 prevails, and ~~shall~~ does not apply to any corporation created by
35 special Act of the Legislature, to the extent that this Act is
36 inconsistent with such special Act; nor ~~shall~~ does the Act apply
37 to any mutual insurer, as defined in Title 24-A, section 401, nor
38 to any financial institution incorporated by special Act of the
39 Legislature or pursuant to general law.

40 **Sec. C-9. 13-B MRSA §403, sub-§1, ¶A-1** is enacted to read:

2 A-1. Whether the corporation is a public benefit
3 corporation or a mutual benefit corporation, as described in
4 section 1406;

6 **Sec. C-10. 13-B MRSA §403, sub-§1, ¶B,** as enacted by PL 1977,
c. 525, §13, is amended to read:

8 B. The If the corporation is a public benefit corporation,
9 the purpose or purposes for which the corporation is
10 organized and, if the corporation is a mutual benefit
11 corporation, the purpose or purposes for which the
12 corporation is organized or a statement that it is organized
13 for all purposes permitted under the Act;

14 **Sec. C-11. 13-B MRSA §704, sub-§3,** as enacted by PL 1977, c.
16 525, §13, is amended to read:

18 **3. Articles of incorporation may provide removal by lesser**
19 **vote.** Subject to the limitation in subsection 4, if the directors
20 are so classified that different classes of members elect
21 different directors, a director may be removed only by the
22 affirmative vote of 2/3 of the members of that class which that
23 elected him the director. The articles of incorporation may
24 provide that such removal may be accomplished by a lesser vote of
25 the members of that class, but in no case by a vote of less than
26 a majority of the members of that class voting on the proposed
removal.

28 **Sec. C-12. 13-B MRSA §704, sub-§5,** as amended by PL 1979, c.
30 127, §101, is repealed.

32 **Sec. C-13. 13-B MRSA §704-A** is enacted to read:

34 **§704-A. Removal of directors by judicial proceeding**

36 **I. Removal.** The Superior Court may remove any director of
37 a corporation from office if the court finds that removal is in
38 the best interest of the corporation and that:

40 A. The director engaged in fraudulent or dishonest conduct
41 or gross abuse of authority or discretion with respect to
42 the corporation;

44 B. Section 713-A has been violated; or

46 C. A final judgment has been entered finding that the
47 director has violated a duty set forth in section 712 or
48 sections 717 to 720.

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2. Who may bring action. A petition for removal under subsection 1 may be filed by:

A. The corporation, if 2/3 of the directors then in office resolve that an individual director should be removed;

B. Two-thirds of the members entitled to vote for that director or a lesser number as provided in the articles of incorporation of the corporation for removal of a director pursuant to section 704; or

C. In the case of a public benefit corporation, the Attorney General.

3. Place of filing. The petition for removal under subsection 2 must be filed:

A. In the county where the corporation's principal office is located;

B. In the county where the corporation's registered office is located if the corporation has no principal office in this State; or

C. In the Superior Court of Kennebec County if the corporation has no principal office or registered office in this State.

4. Court action. The court that removes a director under this section may bar the director from serving on the board of directors for a period prescribed by the court.

5. Notice to Attorney General; Attorney General actions. If the members of a corporation or the Attorney General commences a proceeding under this section, the corporation is made a party defendant. If a public benefit corporation or its members commence a proceeding under subsection 1, the public benefit corporation shall give the Attorney General written notice of the proceeding.

Sec. C-14. 13-B MRSA §713, as amended by PL 1977, c. 592, §16, is repealed.

Sec. C-15. 13-B MRSA §713-A is enacted to read:

§713-A. Public benefit corporation; board

1. Financially interested person. For the purposes of this section, "financially interested person" means:

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2 A. An individual who has received or is entitled to receive
3 compensation from a public benefit corporation for personal
4 services rendered to the corporation by that individual
5 within the previous 12 months, whether as a full-time or
6 part-time employee, independent contractor, consultant or
7 otherwise, excluding any reasonable payments made to
8 directors for serving as directors. An individual is
9 considered to receive compensation for services rendered to
10 a public benefit corporation by that individual if the
11 individual is entitled to receive, other than as a
12 shareholder of a publicly held corporation, a portion of the
13 net income of a corporate or other business entity that
14 provides, for compensation, personal services to that
15 public benefit corporation; or

16 B. A spouse, brother, sister, parent or child of the
17 individual described in paragraph A.

18 2. Board. No more than 49% of the individuals on the board
19 of directors of a public benefit corporation may be financially
20 interested persons.

21 3. Validity; enforceability. The failure to comply with
22 this section does not affect the validity or enforceability of
23 any transaction entered into by a corporation.

24 Sec. C-16. 13-B MRSA §715, as enacted by PL 1977, c. 525,
25 §13, is repealed and the following enacted in its place:

26 §715. Books and records

27 1. Book; records of accounts. Each corporation shall keep
28 correct and complete books and records of accounts and shall keep
29 minutes of the proceedings of its members, board of directors and
30 committees having any of the authority of the board of directors
31 and shall keep at its registered office or principal office in
32 this State a record of the names and addresses of its members
33 entitled to vote. All books and records of a corporation may be
34 inspected by any officer, director or voting member or the
35 officer's, director's or voting member's agent or attorney, for
36 any proper purpose at any reasonable time, as long as the
37 officer, director or voting member or the officer's, director's
38 or voting member's agent or attorney gives the corporation
39 written notice at least 5 business days before the date on which
40 the officer, director or voting member or the officer's,
41 director's or voting member's agent or attorney wishes to inspect
42 and copy any books or records. The only proper purpose for which
43 a voting member may inspect and copy books or records under this
44 section is the purpose of enabling the member to fulfill duties
45 and responsibilities conferred upon members by the articles of
46 incorporation.

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2 incorporation or the bylaws of the corporation or by law. The
3 corporation may require the officer, director or member or the
4 officer's, director's or member's agent or attorney to pay the
5 reasonable cost of the copies made and may impose reasonable
6 restrictions on the use or distribution of the records by such a
7 person.

8 2. Refusal to allow inspection. If a corporation does not
9 make available for inspection or copying the books and records
10 required by subsection 1 or if the corporation seeks to impose
11 unreasonable restrictions on the use or distribution of such
12 books and records, the Superior Court in the county where the
13 corporation's principal office is located or, if the corporation
14 has no principal office in this State, in the county where its
15 registered office is located may order inspection and copying of
16 the records demanded at the corporation's expense upon
17 application of the officer, director or member or the officer's,
18 director's or member's agent or attorney.

19 A. If the court orders inspection and copying of the
20 records demanded, the court shall also order the corporation
21 to pay the costs of the officer, director or member or the
22 officer's, director's or member's agent or attorney,
23 including reasonable attorney's fees, incurred to obtain the
24 order unless the corporation proves that it refused
25 inspection in good faith because it had a reasonable basis
26 for doubt about the right of the officer, director or member
27 to inspect the records demanded.

28 B. If the court orders inspection and copying of the
29 records demanded, it may impose reasonable restrictions on
30 the use or distribution of the records by the demanding
31 officer, director or member or the officer's, director's or
32 member's agent or attorney.

33 Sec. C-17. 13-B MRSA §716, as enacted by PL 1981, c. 7, is
34 repealed.

35 Sec. C-18. 13-B MRSA §§717 to 721 are enacted to read:

36 §717. General standards for directors

37 1. Discharge duties. A director shall discharge the
38 director's duties:

39 A. In good faith;

40 B. With the care an ordinarily prudent person in a like
41 position would exercise under similar circumstances; and

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2 C. In a manner the director reasonably believes to be in
the best interests of the corporation.

4 2. Rely on information. In discharging the director's
duties, a director is entitled to rely on information, opinions,
6 reports or statements, including financial statements and other
financial data, if prepared or presented by:

8 A. One or more officers or employees of the corporation
10 whom the director reasonably believes to be reliable and
competent in the matters presented;

12 B. Legal counsel or a public accountant or other person as
14 to matters the director reasonably believes are within the
person's professional or expert competence; or

16 C. A committee of the board of directors of which the
18 director is not a member, as to the matters within its
jurisdiction, if the director reasonably believes the
20 committee merits confidence.

22 A director is not acting in good faith if the director relies on
information, opinions, reports or statements that the director
24 knows or has reason to believe are unwarranted.

26 3. Performance; compliance. A director is not liable for
the performance of the duties of the director's office if the
28 director acted in compliance with this section and, if a
conflict-of-interest transaction is involved, the transaction was
30 fair to the corporation or was approved pursuant to section 718.

32 4. Trustee. A director is not considered a trustee with
respect to the director's corporation or with respect to any
34 property held or administered by that corporation, including,
without limitation, property that may be subject to restrictions
36 imposed by the donor or transferor of the property.

38 **§718. Director or officer conflict of interest**

40 1. Conflict-of-interest transaction. A
conflict-of-interest transaction is a transaction in which a
42 director or officer of a corporation has a direct or indirect
financial interest. For the purposes of this section, a director
44 or officer has an indirect interest in a transaction if:

46 A. Another entity in which the director or officer has a
material interest or in which the director or officer is a
48 general partner is a party to the transaction; or

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2 B. Another entity of which the director or officer is a
director, officer or trustee is a party to the transaction.

4 2. Transaction not voidable or grounds for liability. A
conflict-of-interest transaction is not voidable or grounds for
6 imposing liability on a director or officer of a corporation if
the transaction was fair at the time it was entered into or is
8 approved as provided in subsection 3 or 4.

10 3. Public benefit corporation; approval. A transaction in
which a director or officer of a public benefit corporation has a
12 conflict of interest may be approved before or after consummation
of the transaction as follows.

14 A. The board of directors of a public benefit corporation
16 or a committee of the board may authorize, approve or ratify
a transaction under this section if the material facts of
18 the transaction and the director's or officer's interest are
disclosed or known to the board or committee of the board.
20 The transaction may be approved only if it is fair and
equitable to the corporation as of the date the transaction
22 is authorized, approved or ratified. The party asserting
fairness of any such transaction has the burden of
24 establishing fairness.

26 B. If the board of a public benefit corporation so
requests, a transaction under this section may be approved
28 by the Attorney General or by the Superior Court in an
action in which the Attorney General is joined as a party.
30 If the board is unable to make a decision regarding a
transaction, one or more directors or officers may request
32 approval of the Attorney General or the court in accordance
with this subsection. The transaction may be approved only
34 if it is fair and equitable to the corporation as of the
date the transaction is authorized, approved or ratified.
36 The party asserting fairness of any such transaction has the
burden of establishing fairness.

38 4. Mutual benefit corporation; approval. A transaction in
40 which a director or officer of a mutual benefit corporation has a
conflict of interest may be approved by the directors or the
42 members of the corporation before or after consummation of the
transaction as follows.

44 A. The board of directors of a mutual benefit corporation
46 or a committee of the board may authorize, approve or ratify
a transaction under this section if the material facts of
48 the transaction and the director's or officer's interest are
disclosed or known to the board or committee of the board.

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2 B. The members of a mutual benefit corporation may
3 authorize, approve or ratify a transaction under this
4 section if in accordance with subsection 6 the material
5 facts of the transaction and the director's or officer's
6 interest are disclosed or known to the members.

7
8 5. Approval by directors of public benefit or mutual
9 benefit corporation. For purposes of subsections 3 and 4, a
10 conflict-of-interest transaction is approved if it receives the
11 affirmative vote of a majority of the directors on the board of
12 directors of the corporation or on a committee of the board who
13 have no direct or indirect interest in the transaction, but a
14 transaction may not be approved under this subsection by a single
15 director. If a majority of the directors on the board who have
16 no direct or indirect interest in the transaction vote to approve
17 the transaction, a quorum is present for the purpose of taking
18 action under this section.

19
20 6. Approval by members of mutual benefit corporation. For
21 purposes of subsection 4, paragraph B, a conflict-of-interest
22 transaction is approved by the members if it receives a majority
23 of the votes entitled to be counted under this subsection. Votes
24 cast by or voted under the control of a director or officer who
25 has a direct or indirect interest in the transaction and votes
26 cast by or voted under the control of an entity described in
27 subsection 1, paragraph A may not be counted in a vote of members
28 to determine whether to approve a conflict-of-interest
29 transaction under subsection 4, paragraph B. The vote of these
30 members, however, is counted in determining whether the
31 transaction is approved under other sections of this chapter. A
32 majority of the voting power, whether or not present, that is
33 entitled to be counted in a vote on the transaction under this
34 subsection constitutes a quorum for the purpose of taking action
35 under this section.

36 7. Additional requirements. The articles of incorporation,
37 the bylaws or a resolution of the board of directors of a
38 corporation may impose additional requirements on
39 conflict-of-interest transactions under this section.

40
41 8. Attorney General action to void transaction. If the
42 Attorney General has reasonable grounds to believe that a public
43 benefit corporation has engaged in a conflict-of-interest
44 transaction and that the transaction was neither fair nor
45 properly approved pursuant to the procedures and standards set
46 forth in subsection 3 or 4, the Attorney General may bring an
47 action in Superior Court in Kennebec County to void the
48 transaction. At least 10 days before bringing such an action, the
49 Attorney General shall send written notice to the board of
50 directors of the corporation of the intent to bring the action.

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The Attorney General may proceed without such notice if necessary to prevent immediate irreparable harm to the public.

9. Authority to fix compensation. Except to the extent that the articles of incorporation or bylaws otherwise provide, the board of directors of a corporation or the executive committee of the board of directors, without regard to this section, has authority to fix the compensation of directors for their services as directors or officers or in any other capacity.

§719. Duties and authority of officers

Each officer is authorized to and shall perform the duties set forth in the bylaws. In addition, each officer, to the extent consistent with the bylaws, has the authority and shall perform the duties prescribed in a resolution of the board of directors of the corporation. The board may authorize an officer, pursuant to a resolution of the board and to the extent consistent with the bylaws, to prescribe the duties and authority of other officers.

§720. General standards for officers

1. Discretionary authority. An officer of a corporation with discretionary authority shall discharge that officer's duties under that authority:

A. In good faith;

B. With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

C. In a manner the officer reasonably believes to be in the best interests of the corporation and its members.

2. Rely on information. In discharging the officer's duties, an officer of a corporation is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by:

A. One or more officers or employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented; or

B. Legal counsel or a public accountant or other person as to matters the officer reasonably believes are within the person's professional or expert competence.

A. n/c

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2 An officer is not acting in good faith if the officer relies on
3 information, opinions, reports or statements that the officer
4 knows or has reason to believe are unwarranted.

6 3. Compliance. An officer of a corporation is not liable
7 to a corporation, any member or other person for any action taken
8 or not taken as an officer if the officer acted in compliance
9 with this section and, if a conflict-of-interest transaction is
10 involved, the transaction was fair to the corporation or was
11 approved pursuant to section 718.

12 §721. Misapplication of funds or assets of public benefit
13 corporation

14
15 1. Prohibited transaction. The funds or assets of a public
16 benefit corporation may not be transferred or applied and a
17 director or officer of a public benefit corporation may not
18 authorize the transfer or application of funds or assets of the
19 public benefit corporation if:

20
21 A. The transfer constitutes a conflict-of-interest
22 transaction that is neither fair nor properly approved as
23 determined under section 718;

24
25 B. The transfer misapplies the funds or assets in violation
26 of statute, including conversion transactions in violation
27 of Title 5, sections 194-C to 194-H;

28
29 C. The transfer is to a director or officer of the public
30 benefit corporation or to another person in a position to
31 exercise substantial influence over the affairs of the
32 corporation and constitutes private inurement or excess
33 benefits that exceed the fair market value of the property
34 or services received in return; or

35
36 D. The transfer of funds or assets is to a subsidiary or
37 joint venture organized as a for-profit entity, unless the
38 board of the public benefit corporation determines in good
39 faith under the facts and circumstances at the time of
40 transfer or commitment to transfer that:

41
42 (1) The organization and operations of the for-profit
43 entity will serve, further or support a charitable
44 purpose of the public benefit corporation;

45
46 (2) The transfer or the commitment to transfer is fair
47 to the public benefit corporation;

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(3) Distributions of net income by the for-profit entity to owners and investors will be proportionate to their investment interests; and

(4) The articles of incorporation, bylaws or similar organizational documents require that compensation transactions between the for-profit entity and investors in the entity or directors or officers of the entity or others in a position to exercise substantial influence over the affairs of the entity be established in amounts that do not exceed the fair market value of services or property to be provided to the entity.

2. Conversion transactions. If a transfer under this section constitutes a conversion transaction as defined in Title 5, section 194-B, subsection 2, the provisions of Title 5, sections 194-B to 194-K may apply and nothing in this section is intended to supersede those provisions applicable to such transactions.

Sec. C-19. 13-B MRSA §802, sub-§5 is enacted to read:

5. Amendment of articles of incorporation of public benefit corporation. If an amendment of the articles of incorporation of a public benefit corporation results in a material change in the nature of the activities conducted by the corporation, the corporation shall give notice to the Attorney General of the amendment simultaneously with the filing of the amended articles with the Secretary of State.

Sec. C-20. 13-B MRSA §906, sub-§1, ¶A, as enacted by PL 1977, c. 525, §13, is amended to read:

A. Each domestic corporation shall comply with the provisions of this Act with respect to the merger or consolidation, as the case may be, of domestic corporations and each foreign corporation shall comply with the applicable provisions of the laws of the state under which it is organized. If the domestic corporation is a public benefit corporation, the merger or consolidation must comply with any applicable provisions of Title 5, sections 194-B to 194-K;

Sec. C-21. 13-B MRSA §907 is enacted to read:

§907. Limitations on merger or consolidation by public benefit corporation

1. Compliance with nonprofit conversion law required. In addition to complying with provisions of this Title, a public

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2 benefit corporation shall comply with all applicable provisions
3 of Title 5, sections 194-B to 194-K.

4 2. Bequests, devises and gifts. Any bequest, devise, gift,
5 grant or promise contained in a will or other instrument of
6 donation, subscription or conveyance that is made to a public
7 benefit corporation and that takes effect or remains payable
8 after a merger or consolidation inures to the surviving
9 corporation unless the will or other instrument otherwise
10 specifically provides.

12 3. Notice; merger or consolidation. Written notice of a
13 merger or consolidation of a public benefit corporation into
14 another public benefit corporation must be provided to the
15 Attorney General simultaneously with the filing of the articles
16 of merger or consolidation with the Secretary of State.

18 **Sec. C-22. 13-B MRSA §1001**, as enacted by PL 1977, c. 525,
19 §13, is amended to read:

20 **§1001. Sale of assets other than in regular course of activities**

22 **1. Terms and conditions.** Sale, lease, exchange, mortgage,
23 **pledge or other disposition of all, or substantially all, the**
24 **property and assets of a corporation may be made upon such terms**
25 **and conditions and for such consideration, which may consist in**
26 **whole or in part of money or property, real or personal,**
27 **including shares of any corporation for profit, domestic or**
28 **foreign, as may be authorized in the following manner.**

30 A. If there are members entitled to vote thereon, the board
31 of directors shall adopt a resolution recommending such
32 sale, lease, exchange, mortgage, pledge or other disposition
33 and directing that it be submitted to a vote at a meeting of
34 members entitled to vote thereon, which may be either an
35 annual or a special meeting. Written notice stating that
36 the purpose, or one of the purposes, of such meeting is to
37 consider the sale, lease, exchange, mortgage, pledge or
38 other disposition of all, or substantially all, the property
39 and assets of the corporation shall must be given to each
40 member entitled to vote at such meeting, within the time and
41 in the manner provided by this Act for the giving of notice
42 of meetings of members. At such meeting, the members may
43 authorize such sale, lease, exchange, mortgage, pledge or
44 other disposition and may fix, or may authorize the board of
45 directors to fix, any or all of the terms and conditions
46 thereof and the consideration to be received by the
47 corporation thereto. Such authorization shall---require
48 requires at least a majority of the votes which that members
49 present at such meeting or represented by proxy are entitled

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2 to cast. After such authorization by a vote of members, the
board of directors, nevertheless, in its discretion, may
4 abandon such sale, lease, exchange, mortgage, pledge or
other disposition of assets, subject to the rights of 3rd
6 parties under any contracts relating thereto, without
further action or approval by members.

8 B. If there are no members, or no members entitled to vote
thereon, a sale, lease, exchange, mortgage, pledge or other
10 disposition of all, or substantially all, the property and
assets of a corporation shall--be are authorized upon
12 receiving the vote of a majority of the directors in office.

14 C. If all members entitled to vote by the articles of
incorporation authorize by written consent a sale, lease,
16 exchange, mortgage, pledge or other disposition of all, or
substantially all, the property and assets of a corporation,
18 no resolution of the board of directors, approving,
proposing, submitting, recommending or otherwise respecting
20 such sale is necessary.

22 **2. Provision prescribing for approval of sale.** The articles
of incorporation of any corporation may contain a provision
24 prescribing for approval of any sale of assets a vote greater
than, but in no event less than, that prescribed by subsection 1.

26 **3. Compliance with conversion law.** If the proposed
28 transaction constitutes a conversion transaction, as defined in
Title 5, section 194-B, subsection 2, a public benefit
30 corporation must comply with the provision of Title 5, sections
194-C to 194-H.

32 **Sec. C-23. 13-B MRSA §1104, sub-§1, ¶D,** as enacted by PL 1977,
34 c. 525, §13, is amended to read:

36 D. That all remaining property and assets of the
corporation have been distributed among its members in
38 accordance with their respective rights and interests, or
have been otherwise distributed pursuant to the articles or
40 bylaws of the corporation, ~~provided--that~~ as long as the
remaining property and assets of a public benefit
42 corporation whose--purposes--and--activities--have--been
primarily charitable, religious, eleemosynary, benevolent or
44 educational shall be are transferred or conveyed only to one
or more domestic or foreign corporations, societies or
46 organizations to a public benefit corporation engaged in
activities substantially similar to those of the dissolving
48 or liquidating corporation or to another entity pursuant to
a conversion plan approved pursuant to Title 5, sections
50 194-B to 194-K; and

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2 **Sec. C-24. 13-B MRSA §1105**, as enacted by PL 1977, c. 525,
§13, is amended to read:

4 **§1105. Dissolution pursuant to court order**

6 Courts of equity shall have full power to decree the
8 dissolution of, and to liquidate the assets and affairs of, a
corporation:

10 **1. Action by member or director.** In an action by a member
12 or director when it is made to appear:

14 A. That the directors are deadlocked in the management of
the corporate affairs and that irreparable injury to the
16 corporation is being suffered or is threatened by reason
thereof of the deadlock, and either that the members are
18 unable to break the deadlock or there are no members having
voting rights;

20 B. That the acts of the directors or those in control of
22 the corporation are illegal or fraudulent;

24 C. That the members entitled to vote in the election of
directors are deadlocked in voting power and have failed for
26 at least 2 years to elect successors to directors whose
terms have expired or would have expired upon the election
28 of their successors;

30 D. That the corporate assets are being misapplied or
wasted; or

32 E. That the corporation is unable to carry out its purposes;

34 **2. Action by creditor of corporation.** In an action by a
36 creditor of the corporation:

38 A. When the claim of the creditor has been reduced to
judgment and an execution thereon has been returned
40 unsatisfied and it is established that the corporation is
insolvent; or

42 B. When the corporation has admitted in writing that the
44 claim of the creditor is due and owing and it is established
that the corporation is insolvent;

46 **2-A. Action by Attorney General regarding public benefit**
48 **corporation. In an action brought to court by the Attorney**
General relating to a public benefit corporation, if it is
50 **established that:**

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2 A. The corporation obtained its articles of incorporation
3 through fraud;

4 B. The corporation has exceeded or abused the authority
5 conferred upon it by law;

6 C. The assets of the corporation are being misapplied or
7 wasted; or

8 D. The corporation is no longer able to carry out its
9 purposes;

10 3. **Complaint.** Upon complaint by a corporation to have its
11 dissolution continued under the supervision of the court; and

12 4. **Liquidation of affairs precedes entry of decree.** When an
13 action has been filed by the Attorney General to dissolve a
14 corporation and it is established that liquidation of its affairs
15 should precede the entry of a decree of dissolution, and

16 5. ~~Proceedings brought in county where registered.~~
17 ~~Proceedings under this section shall be brought in the county in~~
18 ~~which the registered office or the principal office of the~~
19 ~~corporation is situated. It shall not be necessary to make~~
20 ~~directors or members parties to any such action or proceedings~~
21 ~~unless relief is sought against them personally.~~

22 A proceeding under this section must be brought in the
23 county in which the registered office or the principal office of
24 the corporation is situated. It is not necessary to make
25 directors or members parties to such an action or proceeding
26 unless relief is sought against them personally.

27 Sec. C-25. 13-B MRSA §1109, as enacted by PL 1977, c. 525,
28 §13, is amended to read:

29 **§1109. Decree of dissolution**

30 1. **Decree.** In proceedings to liquidate the assets and
31 activities of a corporation, when the costs and expenses of such
32 the proceedings and all debts, obligations and liabilities of the
33 corporation shall have been paid and discharged and all of its
34 remaining property and assets distributed in accordance with the
35 provisions of this Act, or in case when its property and assets
36 are not sufficient to satisfy and discharge such the costs,
37 expenses, debts and obligations, and all the property and assets
38 have been applied so far as they will go to their payment, the
39 court shall enter a decree dissolving the corporation, whereupon
40 after which the existence of the corporation shall cease.

2 **2. Certified copy of decree to Secretary of State.** In-case
3 When the court shall--~~enter~~ enters a decree dissolving a
4 corporation, it shall-be is the duty of the clerk of such the
5 court to cause a certified copy of the decree to be filed with
6 the Secretary of State. No A fee shall may not be charged by the
7 Secretary of State for the filing thereof of the decree.

8 **Sec. C-26. 13-B MRSA §1110, sub-§2,** as enacted by PL 1977, c.
9 525, §13, is amended to read:

10 **2. Deposit with Treasurer of State.** Such A deposit with the
11 Treasurer of State shall must, to the extent thereof of the
12 deposit, absolutely discharge the persons having control and
13 supervision over the distribution of the corporation's assets
14 from liability to such the unknown, unlocated, legally disabled
15 or nonaccepting persons. If the dissolution is under the
16 supervision of the Superior Court pursuant to section 1105, no
17 such the deposit shall may not be made with the Treasurer of
18 State, except pursuant to order of the court, on such terms as
19 the court may order.

20 **Sec. C-27. 13-B MRSA §1302, sub-§4** is enacted to read:

21 **4. Notice to Attorney General in case of public benefit**
22 **corporation.** In the case of a public benefit corporation, the
23 Secretary of State shall notify the Attorney General of the
24 suspension of the corporation's authority to carry on activities
25 under subsection 1.

26 **Sec. C-28. 13-B MRSA §1406** is enacted to read:

27 **§1406. Public and mutual benefit corporation**

28 **1. Public benefit corporation.** A domestic corporation
29 subject to this Act is a public benefit corporation if:

30 **A. It is designated a public benefit corporation by statute;**

31 **B. It is recognized as exempt under the Internal Revenue**
32 **Code, Section 501(c)(3) or any successor provision;**

33 **C. Pursuant to its articles of incorporation or its bylaws**
34 **or by statute, it:**

35 **(1) Is organized for a public or charitable purpose;**
36 **and**

37 **(2) Upon dissolution must distribute its assets to a**
38 **public benefit corporation, the United States, a state,**

2 or a person that is recognized as exempt under the
3 Internal Revenue Code, Section 501(c)(3) or any
4 successor provision; or

5 D. It elects to be a public benefit corporation in
6 accordance with subsection 3 or section 403, subsection 1,
7 paragraph A-1.

8 **2. Mutual benefit corporation.** A domestic corporation
9 other than one described in subsection 1 is a mutual benefit
10 corporation.

11 **3. Filings by corporation existing on effective date.** Not
12 later than January 1, 2004, a domestic corporation in existence
13 on January 1, 2003 shall specify on a filing with the Secretary
14 of State whether it is a public benefit corporation or a mutual
15 benefit corporation.

16 A. The specification may be made on an annual report, on an
17 amendment or restatement of articles of incorporation or on
18 articles of merger, conversion or domestication.

19 B. A corporation that fails to comply with this subsection
20 is a public benefit corporation until proper filing is made.

21 **Sec. C-29. Effective date.** This Part takes effect January 1,
22 2003.'

23 Further amend the bill by inserting at the end before the
24 summary the following:

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26
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31
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33
34 **FISCAL NOTE**

35 The Department of the Secretary of State will incur some
36 minor additional costs to administer the filing of additional
37 forms from certain for-profit entities. These costs can be
38 absorbed within the department's existing budgeted resources.

39 The additional costs associated with the public charity
40 provisions of the bill can be absorbed by the Department of the
41 Attorney General utilizing existing budgeted resources.

42 The additional costs associated with reviewing and reporting
43 on current law governing the conversion of nonprofit hospitals
44 and medical services organizations can be absorbed by the Bureau
45 of Insurance utilizing existing budgeted resources.'

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SUMMARY

2

This amendment replaces the bill.

4

It changes the provisions relating to the Attorney General's authority over public charities by specifying the instances in which the Attorney General may use civil investigation powers under that law, requiring court approval for such investigations and clarifying the relationship between that law and the conversion law and requiring notice to the Superintendent of Insurance when entities regulated by the superintendent are under investigation.

14

The amendment changes key definitions in the conversion sections of the bill, including the definition of "nonprofit conversion transaction" and "fair market value." It provides different processes for reviews of nonprofit conversion transactions, depending on the value of assets involved. Only transactions involving assets worth \$500,000 or more require court approval. The Attorney General approves transactions involving assets worth \$50,000 to \$499,999, using the same standards as for court approval. Transactions with a value of less than \$50,000 do not need approval, although notice to the Attorney General of those smaller transactions is required. The amendment changes the standards for approval of a conversion transaction, provides specific language regarding valuations and distributions of proceeds and changes the penalty provisions. The amendment also adds a provision relating to intervention in court proceedings for approval of conversion transactions. The intervention section allows any person interested in the outcome of the proceeding to intervene in the action. This is intended to provide a liberal standard of "citizen standing", to encourage meaningful participation by members of the public.

34

With regard to the Maine Revised Statutes, Title 13-B, the amendment changes the standard by which conflict-of-interest transactions are judged by removing the business judgment rule for most transactions. With one exception, such a transaction is protected only if it is objectively fair to the corporation. The amendment clarifies who is considered a "financially interested person" in the section of law prohibiting public benefit corporation boards of directors from having more than 49% of the membership consists of financially interested persons. The amendment adds a section of law describing and prohibiting misapplication of funds or assets of a public benefit corporation. This section is intended, among other things, to prevent public benefit corporations from creating for-profit subsidiaries or joint ventures to drain assets of the public benefit corporation for the personal financial benefit of

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investors, directors or officers of the subsidiary or joint
2 venture. The amendment also clarifies the relationship between
the new conversion law and Title 13-B, clarifies the Attorney
4 General's authority to bring an action to void conflict of
interest transactions involving public benefit corporations and
6 changes the law regarding inspection of books and records of the
corporation.

8
The amendment also changes the existing law regarding
10 conversions of nonprofit hospital and medical services
organizations to ensure that conversions of all such nonprofit
12 entities are covered by that law and not the new conversion law.
It also requires the Superintendent of Insurance to review the
14 existing conversion law and report back to the Legislature in
2003 on whether changes are needed to update the nonprofit
16 hospital and medical services conversion law for any future
conversions. The superintendent is specifically directed to
18 submit legislation to clarify that 100% of the net proceeds of a
charitable organization subject to the nonprofit hospital and
20 medical services conversion law are public assets and to make any
other necessary changes.

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