

**PROPOSED ACQUISITION TRANSACTION INVOLVING
EXETER HEALTH RESOURCES, INC.
WENTWORTH-DOUGLASS HOSPITAL AND
THE MASSACHUSETTS GENERAL HOSPITAL**

REPORT OF THE ATTORNEY GENERAL'S CHARITABLE TRUSTS UNIT

September 20, 2019

I. INTRODUCTION

The Charitable Trusts Unit of the Attorney General's Office received a notice and submission, filed May 23, 2019, pursuant to RSA 7:19-b, regarding the proposed acquisition of Exeter Health Resources, Inc. (EHR) and Wentworth-Douglass Hospital (WDH) by a newly formed New Hampshire entity (preliminarily called Newco by the parties). Newco would then become a subsidiary of The Massachusetts General Hospital (MGH). MGH, in turn, is part of Partners HealthCare System.

The transaction is described in an Agreement for Affiliation dated April 12, 2019 and a proposed Governance Agreement. It will result in changes in membership among EHR and WDH related entities. Currently, EHR is an independent entity. It is the sole corporate member of its subsidiaries: Exeter Hospital, Rockingham VNA & Hospice, Core Physicians, LLC, and Exeter Med Real, Inc. WDH is the sole corporate member of its subsidiaries: Wentworth-Douglass Physician Corporation and Wentworth-Douglass Hospital & Health Foundation. WDH currently is a subsidiary of its sole corporate member, MGH.¹

At the closing, Newco will be substituted as the sole member of EHR and WDH. Newco will hold certain director appointment rights and reserved powers over those two entities. Wentworth-Douglass Health System will merge into WDH, ending its separate existence. MGH will become the sole member of Newco and will hold certain director appointment rights and

¹ MGH is a Massachusetts charitable corporation. It seeks to obtain significant control over the governance and operations of a New Hampshire health care organization, which is a matter of considerable interest to this state. RSA 7:19-b is an expression of the state's important oversight of health care transactions. MGH does not contest the jurisdiction of the Charitable Trusts Unit with respect to its proposed transaction with WDH and EHR.

reserved powers. MGH will indirectly hold those appointment rights and reserved powers over WDH and EHR. The boards of directors of Newco, WDH and EHR will then be comprised of the same people, i.e. they will consist of “mirror boards”.² After the closing, the parties plan to integrate to form a New Hampshire-based regional health care network that is part of the MGH system of community hospitals.

In addition to the May 23, 2019 submission, the Charitable Trusts Unit received from EHR and WDH responses dated July 15 and August 14, 2019 to requests for additional information, later supplemented by additional materials that further explain those responses. The documentation submitted by the parties is referred to collectively as the “Notice” and is publicly available. The Notice constitutes one of the requirements of RSA 7:19-b, II and III, which generally obligates the governing bodies of health care charitable trusts, including EHR, WDH and MGH, to satisfy certain minimum standards before they consummate an acquisition transaction.

The Charitable Trusts Unit also obtained input from other health care providers, health policy analysts, elected officials and the public. It has reviewed the record of the public meetings conducted by the organizations on October 2, 2018 in Exeter and on October 9, 2018 in Dover. It has reviewed the media outreach to the public by the organizations leading up to the submission of the Notice. The Director of Charitable Trusts appeared before the Exeter Select Board on August 19, 2019. The Director of Charitable Trusts also met with representatives of Greater Seacoast Community Health, Community Partners of Strafford County, Lamprey Community Health, Seacoast Mental Health Center, Integrated Delivery Network Region 6, the Endowment for Health and the UNH Franklin Pierce School of Law Health Law and Policy Program. The Charitable Trusts Unit received over 50 written comments regarding the proposed transaction.

Finally, the Charitable Trusts Unit retained Katharine London, principal of health law and policy at the University of Massachusetts Medical School Commonwealth Medicine, to assess the effect of the proposed transaction on community benefits, as well as the cost of, quality of and access to health care services. The Charitable Trusts Unit conducted its own public hearing in Exeter on September 9, 2019, with over 300 people attending. During the public hearing, representatives from EHR, WDH and MGH provided presentations and remarks. Ms. London

² The parties have expressed a willingness to change the draft amended WDH and EHR bylaws so that not all of the same people will sit on both the WDH and EHR boards of directors.

presented information at the public hearing about cost and quality metrics at EHR, WDH and MGH, and other preliminary findings and observations. The public hearing included a time period for members of the public to comment and ask questions of the representatives of the entities. The hearing was moderated by a local journalist, who also posed questions to the entities throughout the public event.³

The nation has experienced considerable consolidation in health care over the past two decades, and New Hampshire is no exception. In recent years, there have been numerous health care combination transactions involving hospitals, providers and health care delivery systems across our state. WDH was acquired by MGH less than three years ago. The Charitable Trusts Unit reviewed that transaction and issued a report dated November 21, 2016. The report concluded that the transaction could proceed with no objection from the Charitable Trusts Unit, provided certain conditions were met, some of which extend for five years. The transaction then closed and became effective on January 1, 2017. The conditions that are still binding for those parties may be found in the Charitable Trusts Unit's report, which is publicly available.

Concurrent with the Charitable Trusts Unit's review of the proposed transaction, the Consumer Protection and Antitrust Bureau of the Attorney General's Office has been conducting a nonpublic review of the proposed transaction to assess its impact on competition for health care services in the Seacoast region. *See*, N.H. Const. pt. II, art. 83; RSA chs. 356, 358-A; (state law consumer protection and antitrust provisions).⁴ This ongoing review has included interaction with representatives of EHR, WDH and MGH, and analysis of documents and information including detailed health care data. On September 13, 2019, the Consumer Protection and Antitrust Bureau issued a Notice of Intention to Take Civil Enforcement Action (Notice of Intent) with respect to the proposed combination transaction. As explained more fully below, the Notice of Intent provides cause for the Charitable Trusts Unit to **object** to the transaction.

³ Materials presented at and distributed during the September 9, 2019 hearing are publicly available.

⁴ Federal law also protects consumers from unlawful combinations and restraints of trade, and state attorneys general may enforce federal antitrust laws, including institution of actions under Sections 4 and 16 of the Clayton Act. *See*, 15 U.S.C. §§ 15c, 15f.

II. TRANSACTION REVIEW

The transaction contemplated in the Notice meets the definition of an acquisition transaction under RSA 7:19-b, I(a), because it involves a transfer of control of 25 percent or more of the assets of WDH and EHR. Newco will fully control WDH and EHR, and in turn MGH will exercise substantial control over Newco.

RSA 7:19-b, II sets forth prerequisites for approval of the proposed transaction by the respective boards of directors. In addition to satisfying good faith and fiduciary duties, boards of directors shall not approve a health care acquisition transaction unless six “minimum standards” are met. RSA 7:19-b, II (a)-(g). Accordingly, the boards of directors must evaluate these minimum standards prior to approving a proposed transaction. Then, in reviewing the Notice, the Charitable Trusts Unit must “determine compliance with the standards set forth in paragraph II of this section.” RSA 7:19-b, IV. The first of the six required minimum standards reads as follows:

The proposed transaction is permitted by applicable law, including, but not limited to, RSA 7:19 – 32 [the statutes governing charities], RSA 292 [the statutes governing all nonprofit corporations], and other applicable statutes and common law.

RSA 7:19-b, II(a).

On September 13, 2019, the Consumer Protection and Antitrust Bureau issued a “Notice of Intention to file Civil Enforcement Action under NH RSA 358-A:5” to EHR, WDH and MGH in relation to its nonpublic review of the proposed combination transaction. Such a notice is required before filing an enforcement action where “the attorney general has reason to believe that trade or commerce declared unlawful by this chapter has been, is being or is about to be conducted by any person...” RSA 358-A:4, III. Unlawful acts include any unfair method of competition in the conduct of any trade or commerce within this state. RSA 358-A:2 and :2, XIV (non-exhaustive list of examples includes “[p]ricing of goods or services in a manner that tends to create or maintain a monopoly, or otherwise harm competition.”). *See*, N.H. Const. pt. II, art. 83 and RSA ch. 356 (also protecting free and fair competition in the marketplace for the benefit of consumers).

As a public protection function of the Attorney General’s Office, the Consumer Protection and Antitrust Bureau reviews proposed transactions that would combine health care providers, hospitals, systems, and other health care facilities to assess the potential competitive effects, including whether the transaction may give rise to unlawful restraint of trade or unfair

competition. This includes an analysis of existing overlap between the parties' service lines and facilities, existing and increase of market share and market power implicated by the proposed combination, existing market concentration in the surrounding market, and potential efficiencies to be gained, among other things. Established guidelines and economic analysis are used to determine whether the proposed transaction will give rise to a presumption of anticompetitive harm or otherwise meaningfully lessen competition.⁵

The Charitable Trusts Unit also considers health care costs, as well as quality and access, in its review. It does so in the context of whether boards of directors properly determined that the proposed "transaction is in the best interest of the health care charitable trust and the community which it serves." RSA 7:19-b, II(b). The competitive effect analysis, however, is not part of the review conducted by the Charitable Trusts Unit. That function is left to the Consumer Protection and Antitrust Bureau.

The following observations briefly illustrate the significance of the proposed transaction among EHR, WDH, and MGH for the Seacoast region. Exeter Hospital and Wentworth-Douglass Hospital are within 18 miles of each other and provide similar inpatient and outpatient services. Both EHR and WDH own a significant number of health care professional practices. Within the Seacoast region there are a limited number of health care entities of size and breadth similar to EHR and WDH that also own health care professional practices. While the nonpublic review remains ongoing, the Notice of Intent issued by the Consumer Protection and Antitrust Bureau indicates that its review gives reason for the Attorney General "to believe that trade or commerce declared unlawful by this chapter has been, is being or is about to be conducted by any person," RSA 358-A:4, III. Materials collected as part of the Consumer Protection and Antitrust Bureau's nonpublic review remain confidential unless and until the Attorney General brings an enforcement action in court and secures appropriate protection for the materials.

⁵ See, e.g., DOJ/FTC Horizontal Merger Guidelines (2010); DOJ/FTC Report, Improving Health Care: A Dose of Competition (2004).

III. CONCLUSION

The Consumer Protection and Antitrust Bureau has issued its Notice of Intent under RSA 358-A:5. Accordingly, the Attorney General has reason to believe the proposed transaction is unlawful because it likely will adversely impact competition for certain health care services in the Seacoast region. That means, in simple terms, the Attorney General has determined the proposed transaction is not permitted by applicable law. RSA 7:19-b, II(a). Because of the foregoing, the first minimum standard required for a health care organization acquisition transaction has not been met, and the Charitable Trusts Unit **objects** to the proposed transaction. RSA 7:19-b, IV.

Since the Charitable Trusts Unit objects to the proposed transaction because it is not permitted by applicable law, this report will not discuss the compliance of the boards of directors of EHR, WDH and MGH with respect to the other minimum standards for acquisition transactions. Nor will it discuss the conditions that may be necessary to assure compliance with those minimum standards under the current Notice submission. If the parties are able to resolve the subject matter of the Notice of Intent, they will be required to file a new Notice application for review by the Charitable Trusts Unit pursuant to RSA 7:19-b. At that time, the Charitable Trusts Unit will review the new submission in its totality and consider any potential conditions warranted to satisfy all minimum standards.

Should EHR, WDH and MGH take further steps to consummate the transaction despite the objection set forth in this report, the Charitable Trusts Unit will bring judicial proceedings and seek injunctive relief. RSA 7:28-f, II(c).