PROPOSED ACQUISITION TRANSACTION INVOLVING GRANITEONE HEALTH, DARTMOUTH-HITCHCOCK HEALTH, AND RELATED ORGANIZATIONS

REPORT OF NEW HAMPSHIRE DEPARTMENT OF JUSTICE, CHARITABLE TRUSTS UNIT

MAY 13, 2022

I. INTRODUCTION

On December 30, 2019, several health care organizations submitted to the Charitable Trusts Unit of the New Hampshire Attorney General's Office notice of a proposed change of control transaction that requires a review pursuant to RSA 7:19-b (Notice).[1] Under the proposal, the entities comprising GraniteOne Health would become part of the Dartmouth-Hitchcock Health system. This report describes the proposed transaction as well as the Charitable Trusts Unit's review and conclusions.

The Parties

GraniteOne Health (GO) is a loosely connected system of three New Hampshire hospitals, Catholic Medical Center (CMC), Monadnock Community Hospital (MCH), and Huggins Hospital (HH). GO was formed in 2017 to create a system that would oversee strategies and integration activities for the three hospitals.

CMC is an acute care hospital in Manchester with 261 staffed beds. It was created by the merger in 1974 of two Manchester Catholic hospitals opened in 1892 and 1894. While CMC offers a number of inpatient and outpatient services, it is perhaps best known for its New England Heart & Vascular Institute. In addition to GO, CMC has a second corporate member: CMC Healthcare System (CMCHS). CMCHS is the corporate mechanism to assure maintenance of CMC's Catholic identity. CMCHS is also the sole member of several other health care entities offering services connected with CMC. Unless the context requires otherwise, the acronym CMC will include CMCHS and its member organizations.

MCH is a critical access hospital with 18 staffed beds located in Peterborough. It was formed in 1923 and now offers inpatient and outpatient care in a variety of specialties, including surgery and labor and delivery services. GO is MCH's sole corporate member. Through GO, CMC provides MCH with cardiology and vascular care, hospitalists, and shared laboratory services.

HH is a critical access hospital with 17 staffed beds located in Wolfeboro. It was formed in 1907 and offers inpatient and outpatient medical services, as well as primary care medical practices. GO is HH's sole corporate member. Through GO, CMC provides HH with cardiology and vascular care as well as hospitalists.

Dartmouth-Hitchcock Health (D-HH) is the lead organization of the Dartmouth-Hitchcock Health System (D-HH System), which includes New Hampshire's only academic medical center, Dartmouth-Hitchcock Medical Center (DHMC), including the 396 staffed bed Mary Hitchcock Memorial Hospital (MHMH); physician group practices operated in five locations, known as Dartmouth-Hitchcock Clinic (D-HC); Cheshire Medical Center (Cheshire), a 98 staffed bed community hospital in Keene; Alice Peck Day Memorial Hospital, a 23-bed critical access hospital in Lebanon; New London Hospital, a 25-bed critical access hospital in New London; Mt. Ascutney Hospital and Health Center, a 25-bed critical access hospital in

[1] The Notice, including the response to the Charitable Trusts Unit's request for additional information, may be found on the Department of Justice website.

Windsor, VT; and Visiting Nurse and Hospice for Vermont and New Hampshire. D-HH has recently changed its name to Dartmouth Health, but that name is not used in the Notice, and so it is not used in this report.

Prior Transactions

a) 2016 – CMC, MCH and HH (GO)

In 2016, the Charitable Trusts Unit reviewed the proposal among CMC, MCH and HH to form GO. A no action letter, with conditions, was issued on November 3, 2016, and the transaction then closed on December 30, 2016. This report discusses the GO system in greater detail in Part III, as part of the analysis of the consequences of joining a larger system.

b) 2009 – 2010 - CMC and D-HH

In 2009 and 2010, the Charitable Trusts Unit reviewed a different proposal between CMC and D-HH. The resulting report, dated May 21, 2010, concluded with four objections to the transaction.

The first objection focused on a "profound change in the governance structure of [CMC]" found in the proposal, such that the probate court would need to review the transaction and determine whether the doctrine of deviation would permit it to go forward. The proposal contemplated that D-HH would become the sole member of CMCHS, and would hold a number of reserved powers. The Roman Catholic Bishop of Manchester (Bishop) would also hold certain powers over CMCHS, but not through membership.

The second objection centered on a lack of information as to how the transaction may affect the cost of delivering heath care. The specific question related to whether D-HH physicians in Manchester might be able to charge an enhanced outpatient facility fee as part of Medicare billing, due to their increased use of CMC facilities.

The third objection was based on a perceived lack of safeguards on CMC's "post-affiliation surplus", which was defined as the positive change in net assets attributable to the transaction. The proposal would have permitted use of that surplus to achieve system wide goals.

The fourth objection pointed to still pending reviews by the Bishop, the Federal Trade Commission, the Consumer Protection and Antitrust Bureau of the Attorney General's Office, and the Internal Revenue Service.

While the Charitable Trusts Unit was conducting its review, the New Hampshire House of Representatives and Senate approved House Concurrent Resolution 30 (2010), urging the Attorney General to seek probate court review relating to the "charitable mission and assets" of the parties, and "[t]hat the attorney general file a formal report of his or her actions and decisions taken pursuant to RSA 7:19-b with the general court within a reasonable time so that the public may be satisfied that the director of charitable trusts has fulfilled his or her statutory and common law obligations to the community and to this state."

c) 1998 - CMC and Elliot Hospital

On March 10, 1998, the Attorney General's Office issued a report concerning both the 1994 merger of the parent organizations of CMC and Elliot Hospital into Optima Health, Inc. as well as the subsequent actions of the parties. After the merger, CMC and Elliot were governed by boards of trustees comprised of the same individuals. The Charitable Trusts Unit did not issue a report in conjunction with the 1994 merger, since that transaction took place before 1997, when RSA 7:19-b took effect, and which for the first time required the Charitable Trusts Unit to review hospital transactions.

The 1998 report found that the parties failed to seek probate court judicial relief required under the doctrines of *cy pres* or deviation at the time of the 1994 transaction. The parties then terminated the separate missions of CMC and Elliot by consolidating inpatient operations at one hospital campus and by populating each board with the same individuals. The parties further could not reconcile conflicting fundamental values and practices at the combined hospital with respect to abortion and other reproductive procedures.

Following a period of public input and negotiations, the parties agreed in 1999 to dissolve the merger in a process supervised by the Hillsborough County Probate Court (No. 1999-0339). Neither the court's order dated June 30, 2000 approving the Amended Plan of Disaffiliation nor its final decree dated March 20, 2001 placed specific restrictions on the ability of CMC to enter into future transactions. The decree contemplated the Director of Charitable Trusts' oversight of the planned corporate reorganization of CMC to clarify the Bishop's role as to the hospital's Catholic identity. With the Director's approval, that corporate reorganization took place on December 28, 2001 with the creation of CMCHS as the sole member (parent) of CMC. CMCHS became the vehicle to empower the Bishop (holding reserved powers) to preserve CMC's Catholic identity. The reorganization created two new limitations on future CMC affiliations: that they require the approval of the Bishop and that they must maintain CMC's Catholic identity. Notice, Appendix III (19) and (20). Some earlier documents, including a February 10, 1999 Supplemental Public Written Decision by the CMC "Special" Board, issued during the disaffiliation process, do not supplant the subsequent probate court orders, the Director of Charitable Trusts' approval, the CMC corporate reorganization, and the formation of CMCHS.

Discussions Among the Parties

CMC and D-HH began discussions in late 2017 about ways to increase the level of their ongoing collaboration in a variety of outpatient service areas. That led in 2018 to a consideration of combining the hospital systems. They jointly retained Chartis Group, LLC (Chartis), a health care advisory firm, to consider what such a combined system could achieve, and how it might be structured. CMC separately researched how such a system would be consistent with its Catholic identity. In October, 2018, GO became involved in the deliberations. By January 24, 2019, the parties executed a letter of intent by which CMC, MCH and HH would become part of an expanded D-HH System.

Thereafter the parties continued negotiations. MCH retained BKD, LLP to assist with the evaluation of the proposal and HH retained Stroudwater Associates. D-HH continued its consultations with Chartis. The parties worked through the first half of 2019 on the terms of a definitive agreement. Following the review and approval of the Bishop, on September 23, 2019, CMCHS approved the transaction, and specifically with respect to the Catholic identity of CMC. Finally, by September 30, 2019, all of the parties had executed a binding Combination Agreement.

The Combination Agreement

The Combination Agreement (Agreement) describes a transaction by which D-HH will become the sole member of MCH and HH, and the co-member of CMC (along with CMCHS). D-HH will be renamed Dartmouth-Hitchcock Health GraniteOne (D-HH GO). The entity GO will then dissolve.

The D-HH GO board of trustees will initially be comprised of 15 persons: three executives, 7 nominated by the former D-HH board, and 5 nominated by the former GO board. At the end of a six year transitional period, the D-HH GO trustees thereafter will elect the organization's trustees. Agreement Section 3.3.2(a). As to the MCH and HH boards, the D-HH GO board will appoint up to one third of the trustees, and the MCH and HH boards will nominate the remaining two thirds, subject to approval by the D-HH GO trustees. Agreement Section 3.3.3. As to CMC and the CMCHS subsidiaries, the D-HH GO board will nominate up to one third of the trustees, and CMC and the CMCHS subsidiaries will nominate the remaining two thirds. All CMC and CMCHS subsidiary trustees are then approved by D-HH GO, CMCHS and the Bishop. Id.

The Agreement reflects the parties' intent to construct a "well-integrated" system. The D-HH GO board of trustees will hold certain reserved powers arising out of its membership in the other entities, all as described in sets of bylaws and in the Agreement. Certain decisions of CMC, MH, and HH are subject to approval by D-HH GO, including major changes to the articles of agreement or bylaws, approval of operating and capital budgets, purchase or sale of major assets, elimination or addition of health care programs, and adoption of strategic plans. Following consultation with a hospital board chair, the D-HH GO board of trustees may remove a hospital trustee, hire, evaluate and fire a hospital chief executive, and require a hospital's participation in system-wide initiatives. The D-HH GO board of trustees may also initiate changes in clinical services at a hospital, following a specified evaluation and process. Agreement Sections 3.4.1, 3.4.2.

The hospital boards of trustees will have a role in evaluating its hospital chief executive, identifying local health needs, developing strategic plans, overseeing health care delivery, determining appropriations from the hospital's endowment, and conducting local fundraising. As to CMC, CMCHS will hold the authority to approve changes to the philosophy and purposes of its hospital, including its Catholic identity. CMC may block any proposed exercise of the D-HH GO reserved powers as to CMC that impinge Catholic moral teaching, the ERDs, or Canon Law (collectively, Catholic Policies). CMCHS retains final authority to remove a CMC trustee or to hire or fire the chief executive. Id.

As to the management of the proposed system, the initial chief executive of D-HH GO will be Joanne M. Conroy, MD. She will also serve as the initial president of a new Region I, consisting of the system's operations outside of MCH, HH, and the Merrimack Valley. A new Region II will be created, encompassing MCH, HH, CMC, and D-HC locations in Concord, Manchester, Bedford, and Nashua. Joseph Pepe, MD, GO's chief executive, will be its initial chief executive. Each region will coordinate implementation of strategies. As to Region II, Dr. Pepe will not be involved with activities impinging upon the Catholic Policies, and those matters will be managed from Region I. Agreement Sections 4.2.2, 4.2.3.

Under the Agreement, the D-HH GO board of trustees will be primarily responsible for the financial health of the member hospitals, and D-HH GO will work with members suffering from budget shortfalls. The D-HH GO board may reallocate non-endowment assets around the system to fulfill the system wide strategic plan so long as it does not impair the donor hospital from serving its local health care needs. Any funds reallocated from CMC may not be used contrary to the Catholic Policies. CMC, MCH and HH each will have the opportunity to join the existing Dartmouth-Hitchcock Obligated Group (DHOG), which pools member indebtedness and credit opportunities. CMC's planned inpatient expansion project may depend upon the use of additional credit available from DHOG. Agreement Sections 5.5.2, 5.5.3.

The parties committed in the Agreement to specific clinical priorities, especially as to CMC, including behavioral health, pediatrics, oncology, orthopedics, spine care, bariatrics, and heart and vascular. As to MCH and HH, the parties agreed to determine the feasibility of expanding general and orthopedic surgery, as well as cancer treatment. The parties plan to expand telehealth services, as well as teaching and research programs at CMC. Finally, the parties hope to implement system-wide quality and process improvements. Agreement Sections 5.3.1 – 5.3.6.

The Charitable Trusts Unit's Review Process

New Hampshire law, and specifically RSA 7:19-b, charges the Director of Charitable Trusts of the Attorney General's Office with reviewing acquisition transactions involving health care charitable trusts, including nonprofit hospitals, and determining compliance with the statute's provisions. The statute requires that the Director of Charitable Trusts make his or her determination within a reasonable time, not to exceed 120 days after receipt of a notice of a proposed acquisition transaction.[2] RSA 7:19-b, IV. The Director is required to accept public comment and may conduct public hearings. RSA 7:19-b, IV. When the acquisition transaction involves assets valued at over $5 million, the Director is authorized to engage experts to provide consultation and advice in connection with the Director's duties. RSA 7:19-b, IV.

On December 30, 2019, the Charitable Trusts Unit received a notice and supporting materials, pursuant to RSA 7:19-b, regarding the proposed transaction involving D-HH, CMC, MCH, HH and related entities. The Charitable Trusts Unit requested that the parties provide additional information and documentation, and the Charitable Trusts Unit received from the

[2] RSA 7:19-b was amended by the Legislature in 2019, effective January 1, 2020. This transaction was filed before the effective date of the amendments.

parties responses dated February 24 and March 20, 2020. The documentation submitted will be referred to collectively as the "Notice." The Charitable Trusts Unit posted to its website the documents pertaining to the Notice.

Thereafter, the COVID-19 pandemic caused the Governor to declare a state of emergency which interrupted the Charitable Trusts Unit's review of the transaction. Specifically, Emergency Order No. 29 Exhibit B suspended the deadlines contained in RSA 7:19-b. At the same time, the organizations faced substantial challenges in treating patients and addressing the public health crisis. After the state of emergency expired on June 11, 2021, the parties entered into a tolling agreement setting October 15, 2021 as the new date by which the Charitable Trusts Unit was to issue a report. The parties thereafter agreed to multiple further extensions, through May 13, 2022.

In addition, as part of the review, on October 6, 7 and 12, 2021, the Director of Charitable Trusts hosted public hearings in Peterborough, Manchester, and Wolfeboro respectively. The public could attend each of those hearings in person or remotely, using the Zoom videoconference platform. The Charitable Trusts Unit issued a news release with detailed instructions in advance. Remote participants could participate via computer, smartphone, or telephone. Virtual participants could submit questions and comments in advance or contemporaneously via the Zoom platform. At those hearings, the hospitals and an independent expert made presentations, and members of the public had the opportunity to ask questions and make comments about the transaction. Video recordings of the hearings have been posted to the Charitable Trusts Unit website.

The Charitable Trusts Unit or its consultant also met in person or by teleconference with representatives of the City of Manchester, Manchester Health Department, Amoskeag Health, Mental Health Center of Greater Manchester, Monadnock Family Services, Northern Human Services, Tri-County Community Action Program, Integrated Delivery Network Region 4, Granite United Way, Catholic Charities-New Hampshire, the Endowment for Health, the National Alliance on Mental Illness, Planned Parenthood of Northern New England, New Hampshire Right to Life, leadership of the former Save CMC group, the UNH Franklin Pierce School of Law Health Law and Policy Program, as well as others. The Attorney General's Office issued several media releases and posted a notice on its website, requesting comments from the public, and the Charitable Trusts Unit received about 150 written comments regarding the proposed transaction. About a dozen state and local elected officials also provided input.

The Charitable Trusts Unit retained two experts to assist with the review of the proposed transaction: (1) Katharine London, principal of health law & policy at the University of Massachusetts Chan Medical School Commonwealth Medicine (UMass), who assessed the effect of the proposed transaction on community benefits, as well as cost, quality and access; and (2) the UNH Franklin Pierce School of Law Health Law and Policy Program, which conducted field work and some interviews relating to the transaction.

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 under state and federal law to assess its impact on competition for health care services in the markets served by D-HH and GO throughout New

Hampshire. *See*, N.H. Const. pt. II, art. 83; RSA chs. 356, 358-A; *see also* 15 U.S.C. §§ 18, 26.[3] As part of its nonpublic review, the Bureau retained several consultants including a law firm with expertise in health care antitrust law, a firm specializing in antitrust economics, and a firm that employs specialists in health care data analytics. The Bureau and its consultants engaged in empirical analyses of detailed health care data, engaged with representatives of the parties and examined the parties' documentary submissions and empirical reports, evaluated information provided by various market participants, and considered the input of agencies with subject matter expertise The antitrust review included 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.[4]

II. JURISDICTION OVER THE PARTIES

All of the parties to this transaction are New Hampshire charitable organizations that have registered and report to the Charitable Trusts Unit. *See* RSA 7:28, I and II. D-HH is in the position of the proposed "acquirer" of a health care charitable trust, and so is one of the "parties" to the transaction. Specifically, the proposed transaction contemplates that the incumbent trustees of D-HH will initially elect a majority of the reconstituted D-HH GO board of trustees, and that entity will become the member (or co-member) of CMC, MCH and HH. That structure is enough to give D-HH GO "control", as defined in RSA 7:19-b, I(c), of the other entities. CMC, MCH and HH, are also "parties" that have entered into an "acquisition transaction". RSA 7:19-b, I(b) and III. Accordingly, the Charitable Trusts Unit asserts its jurisdiction over all of the parties in order to conduct its statutory review of the proposed transaction. RSA 7:19-b, IV.

III. APPLICATION OF TRANSACTION REVIEW STANDARDS

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 CMC, its affiliates, MCH and HH. RSA 7:19-b, II prohibits a governing body of a hospital from approving an acquisition transaction unless it complies with the following seven minimum standards:

> (a) The proposed transaction is permitted by applicable law, including, but not limited to, RSA 7:19-32, RSA 292, and other applicable statutes and common law;
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> (b) Due diligence has been exercised in selecting the acquirer, in engaging and considering the advice of expert assistance, in negotiating the terms and conditions of the

[3] 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.

[4] *See, e.g.,* DOJ/FTC Horizontal Merger Guidelines (2010); DOJ/FTC Report, Improving Healthcare: A Dose of Competition (2004).

> proposed transaction, and in determining that the transaction is in the best interest of the health care charitable trust and the community which it serves;
>
> (c) Any conflict of interest, or any pecuniary benefit transaction as defined in this chapter, has been disclosed and has not affected the decision to engage in the transaction;
>
> (d) The proceeds to be received on account of the transaction constitute fair value therefor;
>
> (e) The assets of the health care charitable trust and any proceeds to be received on account of the transaction shall continue to be devoted to charitable purposes consistent with the charitable objects of the health care charitable trust and the needs of the community which it serves;
>
> (f) If the acquirer is other than another New Hampshire health care charitable trust, control of the proceeds shall be independent of the acquirer; and
>
> (g) Reasonable public notice of the proposed transaction and its terms has been provided to the community served by the health care charitable trust, along with reasonable and timely opportunity for such community, through public hearing or other similar methods, to inform the deliberations of the governing body of the health care charitable trust regarding the proposed transaction.

RSA 7:19-b, II.

As to the first standard, based on the review conducted by the Consumer Protection and Antitrust Bureau, 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 Manchester and the surrounding area, the Southwest region, as well as for certain services statewide. 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 Attorney General believes the first minimum standard required for a health care organization acquisition transaction has not been met, and, therefore, **objects** to the proposed transaction. RSA 7:19-b, IV.

Since the Attorney General 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 the Parties with respect to the other minimum standards for acquisition transactions.

Should the Parties take further steps to consummate the transaction despite the objection set forth in this report, the Attorney General will bring judicial proceedings and seek injunctive relief. RSA 7:28-f, II(c).