

May 3, 2012

Mary Beckman, Chief  
Non-Profit/Public Charities Division  
Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108

Dear Ms. Beckman:

This firm represents New England Sinai Hospital and its affiliate, New England Sinai Physician Services Corporation (collectively, “NESH” or the “Hospital”), in connection with the proposed transfer of substantially all of the assets of NESH to Steward Medical Holdings Subsidiary Six, Inc. (“Purchaser”), a wholly-owned subsidiary of Steward Medical Holdings LLC, which in turn is a wholly owned subsidiary of Steward Health Care System LLC (“Steward”). NESH is licensed by the Massachusetts Department of Public Health (“DPH”) as a chronic/rehabilitation services hospital, not as an acute care hospital. It is classified for Medicare purposes as a long-term acute care hospital (“LTACH”). It provides services at a main campus in Stoughton and at two satellite campuses, at Carney Hospital in Dorchester and at Tufts Medical Center in Boston.

This letter is NESH’s notice to the Attorney General pursuant to the provisions of Section 8A(c) of Chapter 180 of the Massachusetts General Laws (“Section 8A(c)”), inasmuch as, upon completion of the proposed sale of the Hospital to Purchaser, NESH will cease operating a hospital and proceed to distribute its remaining charitable assets and dissolve. It will therefore experience a material change in the nature of its activities, as contemplated by Section 8A(c).

For the reasons set forth below, we respectfully submit that the proposed transaction (the “Transaction”), which is the culmination of a lengthy review and evaluation process, is in the public interest and complies with Massachusetts charitable law. NESH requests that you find that NESH’s actions in deciding to pursue the Transaction and the Transaction itself satisfy the criteria applicable under Massachusetts charitable law.

## I. INTRODUCTION

A summary of the Transaction and a copy of the executed Asset Purchase Agreement (“APA”) are attached as Exhibit A. The Transaction will entail NESH transferring substantially all of its operating assets and substantially all of its liabilities to Purchaser and result in Steward continuing the operations of the Hospital following consummation of the Transaction (the

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“Closing”) (such hospital post-Closing referred to as the "Successor Hospital")<sup>1/</sup> As a result, the Successor Hospital will have substantially greater access to capital under its new ownership, will be able to continue to provide high-quality post-acute health care consistent with the historical mission of NESH and retain the jobs of the most of the approximately 888 individuals currently employed at NESH. The Successor Hospital will be the post-acute centerpiece of Steward’s accountable care organization, fully benefiting from Steward’s existing and ongoing investments in health information technology and population-based care. The transfer will be directly to Purchaser as an indirect subsidiary of Steward; however Steward itself has agreed to guaranty the financial and other commitments undertaken by Purchaser under the APA.

Pursuant to the APA, Purchaser will:

- assume virtually all of NESH’s assets and liabilities related to its current operations and allow NESH to retain sufficient cash to satisfy any liabilities not assumed by Purchaser that have not been satisfied pre-Closing;
- hire virtually all of NESH's employees, including employed physicians, subject to Purchaser’s pre-employment screening processes as set forth in the APA;
- offer employees hired by the Successor Hospital compensation equivalent to what they had been receiving immediately prior to the Closing, include them in all applicable Steward benefit programs, and honor all severance agreements that NESH currently has in place with senior management;
- contribute to the NESH defined benefit pension plan (the “Pension Plan”) the amount needed to meet minimum funding requirements under the Internal Revenue Code and ERISA and assume responsibility for administering the Plan;<sup>2/</sup>
- assume NESH’s Medicare and private payer provider agreements;<sup>3/</sup>
- establish a local governance board for the Successor Hospital, consisting initially of those current NESH board members who wish to serve on such board, that will have responsibility for approval of major borrowing, substantial changes in services, strategic planning, capital and operating budgets, capital expenditure prioritization, filing of new Determination of Need applications, medical staff matters and patient quality and safety, as well as for community benefit planning;
- for at least five (5) years post-Closing, maintain an LTACH in Stoughton, Massachusetts, or the immediately surrounding area, providing substantially the same services as the hospital provided immediately prior to the Closing;

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<sup>1/</sup> NESH will retain all donor-restricted and other charitable assets, as well as any right to receive or expectancy in any charitable gift, grant, bequest or legacy. These assets will be disposed of through proceedings in the Massachusetts Supreme Judicial Court.

<sup>2/</sup> The Pension Plan was “partially” frozen as of December 31, 2006, for all employees except those over age 45 with a minimum of 10 years of service. The Pension Plan was fully frozen as of December 31, 2008.

<sup>3/</sup> The Successor Hospital will participate in the Medicaid program as well, but, because of the rules applicable to that program, it will not assume NESH’s current Medicaid provider number.

- for the same period of time, maintain multi-faith pastoral programs at least equivalent to those provided at the Hospital immediately prior to the Closing;
- seek to maintain an affiliation with one or more medical schools for the benefit of the Successor Hospital's patients and medical staff reasonably consistent with the academic programs offered to NESH immediately prior to the Closing relating to fellows, faculty rounds, training of medical staff members and residents, and the like, but recognizing that such programs are operated at the discretion of the medical schools;
- expend or commit to expend \$13 million on capital and information technology expenditures and investment at the Successor Hospital within the first five years following the Closing, with \$5 million being committed or expended within the first two years post-Closing; and
- assure that post-Closing commitments with respect to continuation of services, capital investment and maintenance and role of the local governance board will be assumed by any successor to Purchaser as the owner of the Successor Hospital.

On April 2, 2012, after careful deliberation, consideration of other alternatives and following a lengthy review process described in more detail below, the NESH Board of Directors voted to enter into the APA and authorize the steps needed to consummate the Transaction. In the NESH Board's judgment: (A) it is impossible for NESH to continue operations in its independent charitable form; (B) through the Transaction NESH will receive fair value for its assets; and (C) the Transaction will allow the Successor Hospital to: (1) provide job protection for NESH's current employees, consistent with the APA; (2) secure access to capital for infrastructure and information technology investment and routine maintenance; (3) assure the continuation of the Hospital's services and the maintenance of its historical mission; and (4) become an integral component of a clinically and financially integrated health care delivery system. In reaching this conclusion the NESH Board acted with due care and loyalty, avoided conflicts of interest, and relied upon the advice of qualified, independent consultants while exercising prudent business judgment.

## II. BACKGROUND

NESH is organized as a 501(c)(3) non-profit Massachusetts corporation. It is licensed by DPH as a chronic/rehabilitation hospital and is certified by Medicare as an LTACH.<sup>4/</sup> Throughout its 84 year history, NESH has continuously evolved its service offerings and capabilities to meet its mission of providing affordable, high quality, long term acute care in the greater Boston market – from its founding as a tuberculosis sanatorium, to providing facilities

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<sup>4/</sup> New England Sinai Physician Services Corporation was formed in 2006, is also a 501(c)(3) organization, but has never been operational.

that offer long term care to those with complex conditions, including outpatient services for those with chronic diseases.

The Hospital has 212 total licensed LTACH beds at three locations, as follows<sup>5/</sup>:

- 157 beds at its main 27-acre Stoughton, Massachusetts campus;
- 30 beds at Tufts Medical Center in Boston, Massachusetts;<sup>6/</sup> and
- 25 beds at Carney Hospital in Dorchester, Massachusetts.

NESH serves highly acute long term patients and patients with debilitating injuries that cannot be adequately cared for in a less medically intensive environment. The Hospital provides a full range of inpatient and outpatient services to meet the needs of patients suffering from chronic illnesses and complex medical conditions. Services provided include the continuum of pulmonary treatment and care, from inpatient ventilator management and weaning to outpatient pulmonary rehabilitation for patients with acute and chronic pulmonary conditions. Unlike many other LTACHs, NESH also has a strong rehabilitation program as a result of its affiliation with Tufts University School of Medicine. Additionally, NESH provides a variety of outpatient specialty services and programs through its Wound Care and Hyperbaric Center and The Richard A. Field Diabetes Center. The Hospital also provides physical and occupational therapies, sleep disorder programs, adult day healthcare, rheumatology, and ear, nose and throat care.

As the provider of the largest LTACH pulmonary program in New England, NESH has distinguished itself with numerous industry awards and recognitions. The Hospital's ventilation and weaning programs exceed national benchmarks and consistently receive high patient satisfaction ratings.

Notwithstanding the breadth and excellence of its service offerings, in recent years NESH has experienced significant operating and financial performance challenges, exacerbated by competitive pressures and a challenging reimbursement environment. In March 2010 NESH voluntarily suspended new admissions for three weeks after a DPH inspection identified concerns regarding compliance with documentation policies. The census has never fully recovered from that suspension and in fact has declined every year since then, from an average daily census of 163 in its fiscal year ("FY") 2010 to 158 in FY 2011 to an average daily census of 140 to date in FY 2012.

During FY 2010, NESH took various steps to reduce operating costs, such as a hiring freeze, an early retirement program, a reduction-in-force of approximately fifty employees, a three month freeze in all time-off accruals, a one year salary freeze and a suspension of the

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<sup>5/</sup> In addition, NESH holds a license for 21 skilled nursing facility beds, which are currently classified as beds out of service.

<sup>6/</sup> Of these 30 beds, 9 have been taken out of service with DPH approval in conjunction with a construction program.

Hospital's contribution to its 403(b) plan. Nonetheless NESH incurred operating losses in FY 2010 and FY 2011.

For FY 2012, NESH management implemented a number of performance improvement initiatives expected to result in approximately \$5.5 million in net benefit. These included the elimination of LPN positions, reduction in overtime and merit pay increases, supply chain savings, and efforts to reduce short-stay discharges. FTEs were reduced from 634 in October 2011 to 590 in December 2011. Capital expenditures have been reduced to a bare minimum.

NESH also faces the need to apply cash to satisfy some potentially significant liabilities, particularly with respect to Medicare reimbursement. On September 15, 2011 NESH received notification from CMS that it would be performing a reconciliation of NESH's cost-to-charge ratio for outlier payments for 2007 and 2008. While CMS has not provided formal notification of the exact amount of any liability associated with the reconciliation, NESH estimates that the amount it was overpaid for outlier payments during those two years to be approximately \$6.9 million, which amounts will need to be repaid to CMS. In addition, in October 2011, the Hospital initiated a compliance review of its physician contracts, which led the Board to approve the submission of self-disclosures to the federal Government. These will likely result in a further liability to Medicare, although the amount cannot yet be estimated.

While NESH has met many of its FY 2012 operating objectives, it continues to experience negative cash flow and to deplete its cash reserves. As of the end of March 2012, it had approximately \$1.7 million of cash available for operations, while facing potentially substantial cash needs related to third party reimbursement liabilities, potential compliance liabilities, unforeseen capital expenditure needs, pension liabilities and transaction expenses. Exhibit B contains a liquidity analysis relating to NESH's cash flow for the period from March 2012 through September 2012. Cash flow projections for the balance of FY 2012 raised concerns about the ability of the Hospital to meet its known liabilities, without even considering those that have not yet been quantified.

Further, NESH's ability to borrow is severely constrained. It has a line of credit and a term loan outstanding with Rockland Trust Company, totaling approximately \$7 million, both of which are fully drawn and which Rockland Trust Company requires to be fully secured by cash the Bank holds. As a result, a significant portion of the cash that appears on NESH's balance sheet is not readily available. NESH management believes that no other lending institution would deem NESH creditworthy under these circumstances.

In late February 2012, NESH's independent accountants issued the Hospital's FY 2011 financial statement audit, which included a going concern opinion. See Exhibit C.

Due to its lack of capital, NESH has deferred important facility maintenance and equipment upgrades over the past decade. Its only major recent capital project was for a boiler replacement, paid for from funds restricted for such purpose. NESH estimates that it needs

approximately \$2 million for planned maintenance-related capital spending in FY 2012, and no prospect of having sufficient cash available for this purpose.

This financial pressure led the Board of Directors to conclude that it is impossible for NESH to continue as a stand-alone LTACH. Among the options under consideration have been a bankruptcy filing and a bankruptcy sale. The Transaction, if approved and consummated, will obviate the need for pursuing a bankruptcy process.

### III. PROCESS

In light of the losses and deteriorating financial condition of the Hospital, the President and members of NESH's senior management began a strategic planning process, with the intent of reporting back to the Board of the Hospital in April, 2011. Between January and April the strategic planning group met with leadership of the health care providers and health care systems that constituted the principal sources of patient referrals to NESH to better understand their strategies related to post-acute care and their view of NESH's role in that strategy.

In April, 2011, the Board released a request for proposals to several advisory firms seeking support to better understand the opportunities for NESH to strengthen its financial operations through performance improvement initiatives. Navigant Consulting, Inc. ("NCI") was selected to develop a performance improvement assessment of clinical and financial operations and to provide recommendations as to means for achieving the long-term viability for NESH to remain as an independent, stand-alone organization. NCI's activities included an analysis of clinical and non-clinical workforce, supply chain, revenue growth opportunities, clinical service lines and financial operations. The Board also requested that NCI provide a strategic assessment of possible affiliation opportunities for NESH with larger providers or health systems. NCI provided strategic advisory services to assist the Board to consider multiple transaction options and conducted a detailed analysis of various organizations that could be candidates for a long term strategic affiliation with NESH. This performance improvement and strategic partnership assessment was conducted over a three month period during the summer of 2011, and concluded with a final report to the Board in September 2011.

In September, 2011, NESH engaged Navigant Capital Advisers ("Navigant") and Mintz Levin Cohn Ferris Glovsky and Popeo ("Mintz Levin") to assist it with respect to seeking a capital partner and exploring the implications of a bankruptcy filing. In conjunction with this review, the Board of Directors delegated principal responsibility for conducting the exploration of alternatives to the Executive Committee, the membership of which is set out in Exhibit D. In addition, as the solicitation process narrowed the parties interested in a transaction, and as draft asset purchase agreements were to be considered, the Executive Committee appointed a Working Group consisting of the Chair, Vice Chair and a past Chair who has served for many years on the Executive Committee, all attorneys (the "Working Group"). The Working Group, the members of which are also identified on Exhibit D, monitored the negotiation process, staying in close

contact with NESH's consultants and counsel, and reviewed draft documents in detail to assure that they properly reflected the Board's objectives.

The Executive Committee met, at least monthly from September until it made its final recommendations to the Board on April 2, 2012, to review the progress of the work being done on alternatives and to monitor the process of selecting a potential purchaser. During the later stages of the process, in between Executive Committee meetings, a "team" consisting of the Working Group, senior management, Navigant and Mintz Levin had regular conference calls to test whether a bankruptcy filing would be needed, to review the Hospital's liquidity, and to review the steps, described below, to conduct a sale process.

Upon the engagement of Navigant and Mintz Levin, and after preliminary review and discussions with key NESH Board leadership and senior management, the Executive Committee met on September 27, 2011, at which time Navigant presented a proposed process to be followed for selection of a strategic partner, including internal due diligence, solicitation of interest, execution of confidentiality agreements, issuance of a Confidential Information Memorandum containing detailed information about NESH and follow-up with interested parties. Navigant also presented an array of parties that would be appropriate to solicit for their interest in a transaction with NESH, including non-profit and for-profit entities and health care systems, acute hospital-based and LTACH systems, and real estate investment companies with relationships with LTACH providers. See Exhibit E. Mintz Levin advised the Executive Committee on its responsibilities associated with the process and on the importance of identifying a non-profit partner, if possible.

At the ensuing Executive Committee meeting, on October 13, 2011, Navigant presented proposed criteria for the selection of a strategic partner, a time line for the solicitation process that it proposed to initiate, and additional detail concerning parties to be solicited for interest. The list included regional non-profit and for-profit providers, as well as national LTACH provider systems and real estate investment companies that did not have a presence in Massachusetts. It also identified some of the financial challenges facing NESH that would have significance for the process, especially the Hospital's deteriorating cash position and potential needs for cash. See Exhibit F. At this meeting, Mintz Levin distributed a disclosure form to be completed by the members of the Executive Committee to identify any potential conflicts of interest with any of the potentially interested parties.

Criteria for selection of a strategic partner was discussed at a Board meeting on October 20, 2011, although, for confidentiality purposes the names of the parties to be solicited were not provided. The Board considered its priorities with regard to the selection process and agreed that the following represented the highest priorities for the criteria to be applied in the search:

- continuation of NESH's mission related to long-term care;
- career opportunities for NESH employees and medical staff;
- proper funding for NESH's defined benefit pension plan;

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- the high quality and good reputation of the partner;
- expansion and growth of the institution and/or its services;
- commitment to long term patients;
- maintenance of an academic relationship;
- satisfaction of payer payment obligations; and
- creation of a new pool of money for the institution.

In subsequent conversations with key Hospital employees and some major donors, and with the Medical Staff Executive Committee, these priorities were confirmed to be consistent with their goals for NESH.

For the balance of October and into November Navigant continued to assess NESH's financial circumstances. Prior to beginning a formal solicitation process NESH leadership and Navigant felt it best to understand better the scope of NESH liabilities. Consequently, confirmation was sought and obtained regarding the expected repayment to Medicare for the outlier overpayment (NESH has not yet received formal notification of this obligation being due but has reserved for it), and a detailed analysis of the compliance status of NESH's physician arrangements was initiated. In addition, the Executive Committee sought more information as to the possible necessity of and mechanics for effecting a sale through bankruptcy. Senior management, working with Navigant, continued to manage cash carefully.

On November 7, 2011, Navigant updated both the Executive Committee and the Board on NESH's financial status and the time line for the solicitation process. The Executive Committee also received an initial valuation analysis for use in considering proposals. At the same time, it continued consideration of alternative approaches to address the Hospital's liquidity problem.

On November 11, 2011, Navigant began a broad-scoped solicitation to determine the potential interest of the parties identified to the Executive Committee. Where interest was expressed, Navigant followed up by circulating a template confidentiality agreement as a preliminary step toward more detailed discussions about a possible transaction with NESH. On November 16, 2011, Navigant reported on its progress to the Executive Committee, which authorized it to proceed to release formal requests for proposals ("RFPs") and a detailed confidential information memorandum providing significant detail about NESH to the parties that had signed confidentiality agreements.

Ultimately sixteen interested parties executed confidentiality agreements and received the RFPs and the confidential information memorandum. Responses to the RFPs were due on December 16, 2011. Navigant updated the Executive Committee with regard to the status of the solicitation effort on December 7, 2011.

NESH received four proposals on December 16, 2011 and a fifth one on December 24, 2011. Navigant began immediately to evaluate the proposals as they were received. It provided



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its initial analysis of the first four to the Executive Committee on December 19, 2011, along with background information on the proponents. At the same time it updated the Executive Committee on its liquidity analysis and the alternatives available to NESH to execute a transaction. Of the five proposals ultimately received, based on Navigant's analysis, the Executive Committee concluded that one of the proponents did not have sufficient financial capacity and so it was decided to limit further discussion to only the four.

Also on December 19, 2011, Navigant presented on the solicitation process to the entire Board and, in light of the fact that proposals had now been received, advised the Board on the identities of the parties that had been contacted. The Board's duties with regard to the solicitation and selection process were discussed, including a presumed preference for a non-profit partner since one of the proponents was in that category. Conflict of interest disclosure forms were distributed and completed by the members of the Board who had not previously submitted ones, identifying any potential conflicts of interest with the parties identified.

The Executive Committee was briefed again on January 4, 2012, when Navigant presented a further update on the status of NESH's finances and provided a detailed, but preliminary, comparative analysis of the five proposals. The Executive Committee also discussed the need for accelerating contingency planning for a potential bankruptcy filing at the end of February and discussed the procedures and advantages and disadvantages associated with such a process. The Executive Committee also voted to defer the payment that was due to Pension Plan that month.

During January and February 2012, the parties that had submitted proposals undertook site visits and were asked to submit proposed asset purchase agreements based on a template that NESH had provided to them. Also during this time period planning proceeded with regard to a possible bankruptcy filing and the internal compliance review was being completed. Information about the results of the compliance review was shared with the four proponents in the course of their site visits at NESH and in follow-up conference calls.

During this review period, two of the proponents withdrew from the process, including the only non-profit. This left two remaining proponents, one of which was Steward. Navigant and Mintz Levin prepared to begin negotiations with the two. One, however, established conditions that were problematic for NESH, especially by insisting on a thirty-day exclusivity period in which to undertake due diligence (with no assurance that it would go forward following that period), by requiring that NESH complete its self-disclosure process and ascertain and resolve its resulting liabilities before Closing (NESH understood that there was no way to predict how long this would take) and by the vagueness of the scope of its post-Closing commitments. This proposal contained too many uncertainties and contingencies that could not be managed in light of NESH's deteriorating financial condition. In addition, the proponent did not have a presence in the Massachusetts market, and, while it proposed to have NESH play a role in a national post-acute strategy post-Closing, it was not possible for the proponent to make concrete commitments as to how it would preserve NESH's services and define a role for NESH in a regional ACO-type system.

By contrast, Steward had begun detailed due diligence as soon as it was permitted to do so, entered into intensive negotiations over an APA with Navigant and Mintz Levin, and exhibited a high degree of flexibility in responding to the priorities with respect to the objectives to be achieved from the transaction that NESH had identified. Steward also proposed to make the Successor Hospital the post-acute centerpiece of its ACO-type regional strategy. In addition, and significantly given the discussions above about NESH's serious financial circumstances, in order to stave off the necessity of a bankruptcy filing, Steward offered NESH a \$3 million line of credit that it could draw upon between signing the APA and Closing to be used to support NESH's ongoing liquidity needs.

On February 28, 2012, Navigant presented to the Executive Committee a detailed analysis of the two proposals, with a comparison of their respective financial terms. Navigant updated its valuation analysis as well. At that meeting, the Executive Committee discussed its expectations regarding the terms of a transaction, especially relating to capital commitment, governance oversight and structure, post-closing commitments, medical service contracts, severance benefits, and research and teaching affiliations. The Executive Committee again reviewed its duties and the expected regulatory review process once an APA was signed. The Executive Committee also discussed the on-going due diligence process, transaction schedule and next steps.

Between February 28 and the ensuing Executive Committee meeting on March 21, 2012, Navigant and Mintz Levin undertook detailed negotiations with Steward, with active review of the details of the negotiation and drafts of the APA by the members of the Working Group established by the Executive Committee. As was noted above, all three members of the Working Group have law degrees and two have substantial private practice experience with mergers and acquisitions.

On March 21, 2012, the Executive Committee again received a thorough update on NESH's finances and Navigant's valuation analysis, as well as further information about the proposals and additional information about Steward. Navigant reported that no progress had been made with the other proponent because there was no movement on the issues, described above, that posed serious obstacles to NESH's ability to continue those negotiations.

The Executive Committee then reviewed the status of the APA negotiations with Steward; due diligence, including title and environmental inspection results; the employee and operating liabilities to be assumed by Steward; the closing conditions; and retention of the donor-restricted funds, among other matters. The Board Chair and Navigant reported that there were no meaningful disagreements over business terms with Steward. Based on this discussion, the Executive Committee voted to report to the Board of Directors that it had substantially completed its work on the strategic transaction process, and to recommend to the Board that NESH enter into a transaction with Steward.

NESH substantially completed the negotiations over an APA with Steward, including the terms of the \$3 million line of credit, between the March 21 Executive Committee meeting and both an Executive Committee and a Board meeting on April 2, 2012. On April 2, 2012, at a Board meeting that lasted nearly three hours, the Executive Committee and Navigant presented the terms of the proposed APA with Steward, as well as other aspects of the proposed transaction, including the steps that had led to the Executive Committee recommendation and alternatives that had been considered, such as a bankruptcy filing. The Board voted to authorize signing of the APA and related documents, taking the necessary steps to complete a transaction with Steward and entering into the Transaction following receipt of the requisite approvals.

From September 27, 2011, through April 2, 2012, the Executive Committee met ten times to review and provide guidance to the process described above (plus one additional meeting, on February 21, 2012, specifically to discuss the results of the compliance review undertaken by Mintz Levin, including the review and approval of the first of the Hospital's self-disclosures to the Department of Health and Human Services). In addition, members of the Working Group appointed by the Executive Committee, along with senior management, conferred with the consultants on a regular basis and reviewed in detail drafts of the APA and the documents associated with the Steward line of credit. The Board undertook extensive discussion on the status of the process at four meetings in this time frame (as well as an additional meeting on February 21, 2012, to take action with respect to the results of the compliance review). The Executive Committee and the Board were briefed repeatedly on their duties with regard to a transaction and also as to the review process to which a transaction would be subject. The process that was followed was intended to ensure, and we submit did ensure, that the Executive Committee and the Board were fully apprised of the details and implications of the decisions they faced.

#### **IV. IV. THE CHOICE OF STEWARD**

The only non-profit entity that had expressed an interest in a transaction with NESH withdrew from the solicitation process prior to submitting a final proposal. In considering the two final proposals that were received, the Executive Committee and the Board: relied on the advice of qualified, independent experts and counsel, including bankruptcy counsel, in considering the form the transaction might take, and also on the close monitoring of the review and negotiation process by the three members of the Working Group; examined their fiduciary duties with respect to the decision to be made; exercised their business judgment; and concluded, for the reasons set forth below, that the Steward proposal was the superior proposal. In part, as was described above, the Executive Committee and Board decision was based on the assessment of the alternative bidder and the conditions to negotiations that it proposed to impose. The Executive Committee and Board properly concluded, based on the commitments (both financial and otherwise) Steward was prepared to make contractually to NESH described below, that Steward's proposal as detailed in the APA met NESH's objectives in entering into a transaction and was the best alternative available to enable NESH to carry forward its mission and fulfill its obligations to its patients, employees and creditors.

The following terms of the Steward deal were significant in the considerations of the Executive Committee and the Board:

1. Systems Integration. Steward proposes to preserve NESH's status as an LTACH and to make it the centerpiece of Steward's post-acute strategy in the context of its development of population-based health care models. Steward facilities currently represent the sources of a significant percentage of the patients referred to NESH from acute care hospitals, so that the inclusion of NESH into the Steward integrated delivery system builds upon existing referral and clinical relationships. NESH would, post-Closing, be the only LTACH within the Steward system.

2. Maintenance of an LTACH and the NESH Mission. The Board emphasized the importance it placed on honoring the vision of NESH's founders through continuing a post-acute hospital, even if it was no longer possible to do so in independent charitable form. Steward has committed to maintaining, for a period of at least five years, an LTACH in Stoughton or the immediately surrounding area, using the name "New England Sinai Hospital" or a reasonably similar name and providing substantially the same services as NESH was providing immediately prior to the Closing. For at least the same period of time Steward has also agreed to multi-faith pastoral programs at the Successor Hospital at least equivalent to those provided immediately prior to the Closing. It further agreed, in light of the importance to the Board of the academic mission of NESH, to seek to maintain an affiliation with one or more medical schools for the benefit of the Successor Hospital's patients and medical staff "reasonably consistent with the academic programs offered to the Hospital immediately prior to the Closing," relating to fellows, faculty rounds, training of medical staff members and residents, and the like (although the APA recognizes that such programs are operated at the discretion of the medical schools).

3. Commitment to Employees. Protection of employees has been a key objective for the Board. Steward has committed to funding and administering the Pension Plan in accordance with ERISA and IRS requirements. As is described above, NESH has frozen the Plan and its liquidity problems have made its ability to continue to fund the Plan problematic. In addition, Steward has agreed to hire virtually all of the current NESH employees, as set forth in the APA, at equivalent levels of compensation and with benefits consistent with those available under Steward's plans, and to honor the severance agreements currently in place with NESH senior managers, whether or not these senior managers become employees of Steward.

4. Assumption of Liabilities. Steward is assuming virtually all of the liabilities of NESH, and, for those that it is not assuming, it will leave cash and cash equivalents with the charitable corporation to satisfy those obligations. NESH should have cash sufficient to satisfy these liabilities, and it will also retain donor-restricted and other charitable assets, which will be distributed post-Closing in a manner agreed to by the charity, the Office of the Attorney General, and the Supreme Judicial Court. The parties have established a budget for "wind down"

activities by NESH, and funds to meet those expenses will be included among the retained assets.

5. Post-Closing Financial Commitments. Steward has agreed to expend or commit to expend no less than \$13 million in the aggregate during the first five years following the Closing for capital expenditures and other investments to improve, furnish, equip and expand the services of the Successor Hospital, including no less than \$5 million dollars to be expended or committed to be expended in the aggregate within the first twenty-four months following the Closing. While the APA provides that these amounts must qualify as capital expenditures under generally accepted accounting principles (“GAAP”), the APA also provides that some of these funds may be used for operating costs directly associated with the acquisition, installation, and configuration of information technology and training related to information technology at the Successor Hospital.<sup>7/</sup>

6. Local Governance Board. Steward has agreed that, as soon as reasonably practicable after the Closing, it will create a local governance board for the Successor Hospital and have appointed to it, initially, those members of NESH’s Board of Directors who hold office immediately prior to the Closing and who express a desire to be appointed to the local governance board. This board will be the governing body of the Successor Hospital, subject, however, to the authority of Steward, and will have authority that includes, but is not limited to, the following: (i) approval of borrowings in excess of \$500,000; (ii) additions or conversions that constitute substantial changes in service; (iii) approval of capital and operating budgets, including prioritization of capital investments; (iv) approval of the filing of applications for determinations of need with DPH; (v) development of strategic plans; (vi) medical staff credentialing and patient quality and safety matters; and (vii) community benefit planning. Subsequent to the Closing, the members of this board will have sole responsibility for nominating individuals as their successors on the board, and Steward’s board of directors will appoint the individuals who are nominated to the local governance board with the following conditions: (i) each nominee is approved by Steward’s Chairman in accordance with the provisions of the APA; (ii) the local governance board will, following the initial appointments, consist of medical staff members, community leaders and appropriate executive officers; and (iii) the local governance board will be organized and constituted so as to enable the Successor Hospital to maintain certification as an LTACH under Medicare rules.

7. Obligations of Successors. Steward has also agreed that (i) if the Successor Hospital is transferred to another affiliate of the Purchaser or of Steward, the commitments regarding continuation of services, post-Closing financial commitments and the local governance board will be continued in effect by the affiliate; and (ii) if the Successor Hospital is transferred to an entity that is not an affiliate of the Purchaser or Steward, the successor will be obliged to

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<sup>7/</sup> Since there may be a question as to whether these operating costs may be considered as capital expenditures under GAAP, they have been specifically identified as permissible uses for the \$13 million investment.

continue those commitments and will also agree to require any of its successors to honor those commitments.

8. Guaranty. Since Purchaser is a newly created subsidiary of Steward, formed to acquire NESH's assets and liabilities and operate the Successor Hospital, Steward itself has agreed to guaranty the Purchaser's financial obligations under the APA as well as the post-Closing commitments described above.

After considering these and other relevant factors, and recognizing that no better proposal was available to be presented to the Board, and none in the final analysis from a non-profit entity, the NESH Board concluded that, as between the two proposals it did receive and analyze, Steward's was the superior alternative for satisfying the key objectives defined by the Board at the outset of the solicitation process and, because of the limited number of closing conditions under the APA, the Steward proposal offered NESH the ability to close quickly, subject to necessary regulatory approvals, which the Board saw as a benefit in light of NESH's liquidity position.

## V. NO CONFLICTS OF INTEREST

No officer, trustee, employee, or other individual associated with NESH, or any family member of such individual, will receive any financial benefit for the approval and completion of the Transaction with Steward.<sup>8/</sup> The President of NESH is compensated for her services as President on a fair-market-value basis, for the services she provides to NESH, but no other Board member is compensated for service on the Board. As was noted above, each member of the Board submitted disclosure statements with respect to their relationship with both of the two proponents and no disclosure suggested the need for any Board member to recuse himself or herself from the final votes on the Transaction.

There has been no discussion regarding compensation for service by any current NESH Board member on the local governance board of the Successor Hospital, nor any discussion about compensation arrangements for senior management who become employees of Steward

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<sup>8/</sup> NESH entered into an agreement with the chief financial officer relating to a bonus to be paid for services he would be providing the Hospital beyond those for which he was compensated as chief financial officer. These significant additional services encompassed responsibilities in conjunction with a potential transaction, whether within or outside of bankruptcy, including (a) formulating strategy with Hospital professionals in connection with a transaction and the procedure by which the Hospital will enter into a transaction, (b) meeting with prospective buyers, and (c) working to quantify, manage and reduce (where possible) various large claims, including, without limitation, underfunded pension liability, Medicare overpayment liability and other compliance liability, on an expedited basis "to stabilize the purchase price" the Hospital would realize from a transaction and/or to maximize remaining funds that might be available for payment to creditors. The bonus payment is due on the chief financial officer's last day of employment by the Hospital and is not contingent on a transaction actually taking place.

beyond what NESH negotiated for and obtained in the APA. As was described above, the President, the Chief Financial Officer, and virtually all other NESH employees are to be offered positions by Steward at equivalent compensation levels, but none of them will be compensated either by NESH or by Steward for causing the Transaction to be considered or completed.

## **VI. BENEFITS TO THE PUBLIC**

For the reasons described above, the proposed Transaction is in the public interest. It will:

- assure the continuation of NESH's historic mission with regard to providing post-acute care;
- protect the jobs of most of the current workforce at NESH; and
- produce an investment of \$13 million at the Successor Hospital within the first five years following the Closing.

## **VII. FAIR VALUE WILL BE PAID**

Under traditional charitable law, Steward must pay "fair value" for the assets and operations of NESH. The most effective way to determine fair market value is through arms' length negotiation between parties. The process undertaken by NESH's Board and management, described above, was exhaustive and fulfilled their duties to NESH. Significantly, no better, or even equivalent, proposal was presented to the NESH Board. The financial terms of the APA were heavily negotiated between NESH and Steward, including the scope of the liabilities to be assumed by Purchaser. Because of the process conducted by the NESH Board and the relationship between the parties to the negotiation, NESH submits that the overall consideration that NESH will receive in conjunction with the Transaction will return fair market value to the charity.

## **VIII. CONCLUSION**

During the past fifteen months, the NESH Board and its Executive Committee intensively investigated alternatives for the long-term continuation of NESH's mission. The NESH Board determined that NESH could not continue as an independent non-profit organization and had no non-profit alternative available to it.


Without the proposed Transaction, NESH will be forced to close, at great cost to patients, employees, creditors and the larger health care system. The Transaction will provide NESH with the resources necessary to have its debt obligations discharged, and to allow the Successor Hospital to improve its facilities and services and retain employment for most of the current NESH personnel. Steward was clearly the superior bidder, and demonstrated the financial support, information technology, personnel, and other systems necessary to ensure NESH's long-term survival as part of a larger, clinically and financially integrated health care delivery system. The NESH Board, after significant deliberation and based on the input of the Working Group,

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NESH respectfully requests that the Attorney General find that the Transaction complies with the applicable criteria under charitable law for the sale by a charity of substantially all of its assets to a for-profit entity. NESH welcomes the Attorney General's review of the proposed Transaction.

Respectfully submitted,



Stephen M. Weiner  
on behalf of  
New England Sinai Hospital and  
New England Sinai Physician Services  
Corporation

Cc: Richard Blankstein, Esq.  
David S. Szabo, Esq.  
Laurie Weinstein, Esq.



**List of Exhibits**

- A Transaction Summary and Executed Asset Purchase Agreement
- B Liquidity analysis, March 2012 through September 2012
- C NESH FY 2011 Audited Financial Statements
- D NESH Executive Committee and Working Group