

July 20, 2015

VIA EMAIL

Wendi A. Horwitz, Esq.
Deputy Attorney General
State of California Department of Justice
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Re: Request to Amend Conditions to Sale of Emanuel Medical Center

Dear Ms. Horwitz:

I write as legal counsel to and on behalf of Legacy Health Endowment (“LHE”) to request an amendment, pursuant to title 11, California Code of Regulations section 999.5, subdivision (h) (“Subdivision H”), to the first paragraph of Condition XVII of the Conditions to the Proposed Sale of Emanuel Medical Center and Approval of the Asset Purchase Agreement by and between Emanuel Medical Center, Inc. and Doctors Medical Center of Modesto, Inc., issued January 10, 2014 (the “Conditional Consent”).

Pursuant to the requirements of Subdivision H, below I set forth: (i) a description of the proposed amendment; (ii) a description of the change in circumstance requiring each such amendment; (iii) a description of how such amendment is consistent with the Attorney General’s Conditional Consent to the transaction; and (iv) a description of the efforts of LHE to avoid the need for amendment.

I. Description of the Proposed Amendment.

The first paragraph of Condition XVII of the Conditional Consent reads as follows:

Prior to Legacy Health Endowment entering into any employment contracts for (1) president or chief executive officer, (2) the treasurer or chief financial officer, and (3) other corporate officers, Legacy Health Endowment’s Board of Trustees shall exercise due care and shall conduct a thorough search in determining the

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best qualified individual to fill each position and shall employ only those individuals that have at least two years' experience as a corporate officer of an endowment, grant-making foundation, or community foundation with net assets of at least \$10 million.

LHE proposes that such paragraph be amended to read as follows (proposed additions shown in **bold**, deletions in ~~strike through~~):

Prior to Legacy Health Endowment entering into any employment contracts for (1) president or chief executive officer, (2) the treasurer or chief financial officer, and (3) other corporate officers (**with the exception of assistant secretary**), Legacy Health Endowment's Board of Trustees shall exercise due care and shall conduct a thorough search in determining the best qualified individual to fill each position and shall employ only those individuals that have at least two years' experience **either: (i) as a corporate officer (with the exception of assistant secretary) or (ii) in a senior executive or senior director-level position reporting directly to the chief executive officer, chief operating officer, or chief financial officer. In each instance, such experience must have been with** ~~of~~—an endowment, grant-making foundation, or community foundation with net assets of at least \$10 million.

II. Description of the Change in Circumstances Requiring Such Amendment.

When Condition XVII was issued, LHE did not anticipate that Condition XVII would impose an unreasonable burden on LHE's ability to hire a chief executive officer, chief financial officer, and other corporate officers. LHE understood that the purpose of this condition was to ensure that the new officers would be well qualified to lead LHE. After completing a comprehensive, national search for a CEO, LHE can now share with the Attorney General evidence that this condition has significantly hindered the ability of LHE to hire corporate officers within a commercially reasonable period of time without undue delay and expense on the part of LHE.

Soon after the closing of the transaction, LHE initiated a Search Committee and in November, 2014 engaged the services of Alford Executive Search ("Alford"), an executive search firm specializing in hiring of nonprofit executives. Alford recently completed a comprehensive, national search to fill the CEO position (which is described further in Section IV below). Despite Alford's significant efforts specifically targeted at recruiting candidates meeting the corporate officer qualification, the pool of total candidates consisted of 37 applicants for the LHE CEO position, and less than half met the requirement of having served for at least two years as an officer of a qualifying grant-making organization. Of those who did technically meet that

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requirement, many were non-employee officers, meaning they were officers by virtue of their volunteer positions on boards as trustees, and not because they had executive responsibilities within an organization. LHE did not consider candidates who had the title, but not the day-to-day responsibilities of executive officers, to be qualified candidates for the position.

Through the search process, Alford reported that those potential candidates with current executive officer experience at qualified organizations were unwilling to consider a transition to a new, start-up foundation, even if LHE had greater assets than the potential candidate's current employer. At the time the Conditional Consent was issued, no one could know how difficult it would be to find interested, viable candidates who met the officer requirement of Condition XVII. The change in circumstances is that LHE now has such data and can provide it to the Attorney General's office.

III. Description of How Such Amendment Is Consistent with the Attorney General's Conditional Consent.

As noted above, LHE understands that Condition XVII was issued in order to ensure that LHE hire executive staff with significant experience. LHE is fully committed to hiring the most qualified and experienced candidates possible. As described below, LHE undertook a thorough and comprehensive search to find a candidate who met the condition.

The proposed amended language allows for hiring only well-qualified candidates who have served in crucial, key leadership roles within their organization as corporate officers or top-level directors just below the corporate officer level. Equally important is the impact of the proposed amended language on future internal candidates for LHE's most senior executive positions. As currently written, LHE would never be able to promote anyone serving in a position just below the officer level to a corporate officer position. We believe that may be an unintended consequence of the condition, and does not further the purpose for which we understand the condition was imposed. Such hiring from within is not unusual in large grant-making foundations, and often provides some of the best candidates for leadership. Moreover, if LHE cannot offer its senior staff below the officer level the possibility of promotion, it is likely to lose such employees who will know that they must eventually leave LHE if they wish to rise to the most senior executive level. The proposed amended language would allow LHE to promote highly qualified candidates from within LHE in the future, consistent with the intent of the condition.

One example of a recent candidate exemplifies how the proposed amendment is consistent with the purpose of the Attorney General condition as we understand it. This candidate is well-qualified for the position of CEO and brings significant, relevant experience.

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The candidate has been a director¹ at a conversion foundation with assets of over \$100 million that was formed when a nonprofit hospital was sold to a for-profit hospital system. The candidate reports directly to the CEO, and manages a budget larger than any employee of the foundation other than the CEO. The candidate has significant authority to act on behalf of the foundation, attends all board meetings, manages a standing committee of the board, and represents the foundation publicly. In addition, the candidate has worked for almost 25 years in nonprofit grant-making organizations or government agencies dedicated to healthcare and public health related issues.

LHE is confident that candidates such as the example above bring the skills and experience necessary to shape and guide the organization into a successful, established foundation. LHE is equally concerned that the other viable candidates from the search it has just completed are withdrawing because they did not meet the condition. LHE believes that it will not likely find a qualified candidate under the current condition without extensive and prolonged further efforts. Such efforts delay LHE in starting its grant-making program, which seem inconsistent with the Attorney General's goals in imposing the condition. While the officer requirement of Condition XVII appears on its face to be a useful proxy for relevant experience, in practice, it has served only to potentially disqualify other seasoned and experienced professionals who may be the best candidates for the position, and based on its recent experience, it appears such unfortunate results will likely recur whenever LHE is faced with hiring its most senior executive positions. The proposed amendment would ensure the depth and relevance of candidates' experience in keeping with the Attorney General's concerns, without such detriment to LHE.

IV. Description of the Efforts of LHE to Avoid the Need for Amendment.

As previously stated, LHE made significant efforts to comply with the condition and avoid the need for an amendment. LHE began discussions with Alford in early October and contracted with them in November, 2014 to conduct a nationwide search for LHE's first chief executive officer. The search resulted in far fewer candidates than Alford normally receives for comparable, but established, organizations, despite Alford investing twice as much time and effort on the search than normal for this type of position. The typical candidate pool is between 50-100 applicants. Despite expending greater effort, Alford received only 37 applicants for the LHE position. The pool was highly qualified and diverse in its makeup, but few of the candidates met the Attorney General's requirement of having experience as a corporate officer at a grant-making foundation with assets over \$10 million.

¹ The title of "director" refers to the candidate's management position at the foundation, not a position on the board of directors. The candidate does not serve on the board of directors of the foundation for which the candidate works.

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Alford placed online advertisements for the position – which included as a required job qualification that applicants meet the Attorney General’s requirements – at 28 unique and relevant job search sites. They also sent the position advertisement directly to 4,570 individuals whose names were selected because of their relevance to the search, as holding positions in healthcare or foundation leadership. Alford staff also made numerous personal networking contacts and meetings through direct phone calls, social networking conversations (e.g., LinkedIn), and follow-up contacts with candidates to whom they were referred. All of this outreach and advertising resulted in 37 total applicants representing 16 different states.

Of the 37 total applicants, 17 self-reported as having met the Attorney General requirement and were therefore vetted more fully by Alford through a series of written exercises, phone-screenings, and in-person interviews. During the phone-screenings, candidates were asked specifically about their corporate officer experience. It was discovered that many of the applicants who self-reported as having met the qualification did not actually meet the technical requirements of the Attorney General’s condition. For many of those candidates who appeared to actually meet the condition, it was impossible to verify without contacting their current employer to confirm their corporate officer status, and, inevitably, disclosing the candidate’s application for other employment.

Five of the 17 candidates were advanced to meet with the LHE Search Committee, and two finalists were advanced to the final round of interviews. The candidate with the experience and qualifications under the current condition withdrew for unrelated personal reasons. The second candidate had impressive experience, however, was found not to meet the current condition as written.

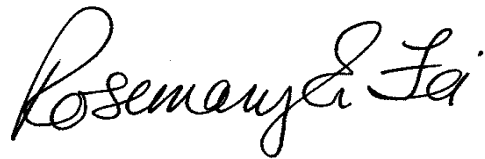
LHE continues to be committed to hiring the most experienced candidate for the position as possible, and was very focused on meeting the Attorney General’s requirements in the process. The requirement remained at the forefront of its search, and LHE instructed Alford to take all steps possible to attract viable candidates who met the technical requirements of the Attorney General’s conditions.

V. Conclusion.

As required in Condition XVII, LHE’s Board of Trustees has exercised due care and has conducted a thorough search to determine the best qualified individual to fill the position of chief executive officer. It made all reasonable efforts to find candidates who had at least two years’ experience as a corporate officer of an endowment, grant-making foundation, or community foundation with net assets of at least \$10 million. While LHE’s extensive efforts were focused on finding the best candidate who meets the literal, technical requirements of the condition, it found there may be other candidates who more than meet the intent of the condition.

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LHE could at this time redouble its efforts and continue its search until a qualified candidate who meets both the needs of the organization and the technical requirements of the condition is identified; however, the results of their already extensive search indicate that it would likely take a very long time to find such a person. The time and expense of continuing to search for such a candidate, with the constraints of the condition as currently written, may not be the best use of LHE's charitable assets. We do not believe the purpose of the Attorney General condition was to make hiring so expensive and time-consuming. In order to allow LHE to move forward in accomplishing its charitable purposes under the leadership of an experienced and well-qualified chief executive officer, we respectfully request that the Attorney General amend the first paragraph of Condition XVII of the Conditional Consent, preserving the requirements for relevant experience and qualifications while providing greater flexibility in meeting those requirements.



REF:AAR:mmg

Enclosure

cc: Legacy Health Endowment Board of Trustees
(via email)