

<p>BEFORE THE ATTORNEY GENERAL  OF THE STATE OF COLORADO  1300 Broadway, Denver, CO 80203</p>	
<p><b>In re: Master Plan of Conversion filed by Total  Community Options, Inc., d/b/a InnovAge, and its  Subsidiaries</b></p>	
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<p align="center"><b>SUPPLEMENTAL OBJECTIONS AND COMMENTS TO, AND REQUESTS  CONCERNING, THE MASTER PLAN OF CONVERSION FILED BY TOTAL  COMMUNITY OPTIONS, INC. D/B/A INNOVAGE AND ITS SUBSIDIARIES,  BY COLORADO CROSS DISABILITY COALITION, JULIE REISKIN ON  BEHALF OF PAMELA CARTER, AND THE COLORADO CENTER ON LAW  AND POLICY</b></p>	

InnovAge filed three primary documents in this proposed conversion after the initial filing of the Master Plan of Conversion on October 30, 2015 (hereinafter referred to as the “Plan of Conversion”) and the filing of the June 30, 2015 financial statements on November 6, 2015. Those include VMG’s Updated Fair Market Analysis dated November 24, 2015 (hereinafter referred to as “VMG’s Supplemental Report”) the InnovAge letter dated December 26, 2015 (InnovAge Letter) and the InnovAge Foundation letter of December 8, 2015. InnovAge also presented information orally and in writing at the December 17, 2015 public hearing. No documents filed after December 26, 2015 were considered. Pursuant to § 25.5-5-412, C.R.S., the Colorado Cross Disability Coalition (CCDC), Julie Reiskin on behalf of Pamela Carter, and the Colorado Center on Law and Policy (CCLP) (together “Objectors”), respond to those materials herein.

Attorney General Cynthia Coffman, acting under statutory and common law authority, has provided the public with an extended forum for written comments and a public hearing. Objectors appreciate the Attorney General’s recognition of the vital role of the public process. We believe public input adds significantly to the information provided by InnovAge and will help inform a final decision as to how a conversion might best serve the public to whom this benefit belongs.

## I. Valuation

With respect to the fair market value of InnovAge, it is undisputed that VMG has not done a market valuation, either in its earlier valuation or in VMG’s Supplemental Report. The only fair market valuation before the Attorney General is the Levitt Innovage Valuation Analysis (LIVA) of December 4, 2015. *See* Objections and Comments dated Dec. 10, 2015, App. 1. That report is supplemented by a supplemental analysis dated Jan. 6, 2015. *See* Exh. 1, Levitt’s Supplemental Analysis. Levitt’s Supplemental Analysis re-confirms the fair market range specified in the LIVA, of \$303 to \$354 million plus the fair market value of InnovAge’s real estate, as of June 30, 2015.

Materials submitted in November and December 2015 by InnovAge do not address key aspects of the valuation. VMG’s Supplemental Report does not provide a basis for how the real estate values are determined, how the methodologies employed tie or do not tie to the earlier valuation report, or how capital adjustments are determined, and fails to show how “excess cash” is determined.

Nor does the InnovAge Letter fill in these gaps in information. It does not provide fair market value information or even address the LIVA findings. It does not explain the absence of current real estate appraisal information and continues to allow Welsh to require \$15 million in escrow, without any express reason therefor. Foundations typically spend no more than 5% of the corpus in any year. In the event that a foundation spent even 10% a year for four years, with invested funds earning only 1% interest, substantial funds would be available to satisfy any claim Welsh might be able to prevail upon.

Objectors understand that InnovAge argues that “intangible factors” can substitute for fair market value under the statute. However, Objectors know of no legal authority for this proposition and the statutory test here is “fair market value.” § 25.5-5-412(14)(I)(A), C.R.S. That is what must be turned over to the recipient of the proceeds. If there are enhancements to the transaction which may benefit Colorado generally, that is a consideration the Attorney General possibly may weigh in determining whether the transaction is “in the public interest,” but not in determining whether “fair market value” will be paid to the recipient of the proceeds. The claimed enhancements do not affect the “fair market value” test.

Despite the request in CCLP’s Letter to Attorney General Cynthia Coffman dated Nov. 17, 2015 (Comment 3), InnovAge also has not provided information regarding the expenses involved in preparing for the conversion. Expenses associated with the hiring of lawyers, lobbyists, a financial advisory firm, a valuation firm and required special accounting should not be borne by the affected community or the public. Rather, the value of these expenses should be added back into operating income for the years involved, and the improved income and EBITDA used for the fair market value determination.

Finally, Objectors understand that the Office of the Attorney General has hired an independent valuation expert. Any conclusion as to what the fair market value of InnovAge is should await such report, and an analysis of whether its conclusions outweigh the LIVA. The Attorney General cannot find that the Offer or the VMG valuation alone satisfies the statutory requirement that the fair market value at closing is to be delivered to the non-profit recipient of the proceeds.

## **REQUESTS**

As a result of the foregoing and Objectors’ previous submissions, we request that the Attorney General do the following:

Adopt the LIVA valuation of \$303 million to \$354 million, adjusted by the following: 1) an adjustment upward by real estate values for all InnovAge and subsidiary or affiliate owned real estate determined by current appraisals, and 2) an adjustment upward required by the deduction of conversion expenses from the EBITDA analysis as an appropriate expense for valuation purposes of the ongoing operation.

Disallow the portion of the proposed transaction that would require \$15 million, or any other amount, of the proceeds to be placed in escrow for the benefit of the Buyer.

Require InnovAge to provide for public posting any and all of InnovAge’s real estate appraisal information, along with Annexes II and III and Section 2.5 of the SPA, referenced in the InnovAge Letter at p. 7.

Post the valuation report produced by the Attorney General’s expert and extend or re-open the public comment period for 7 days after posting to allow for comment on that valuation report or other developments material to the proposed conversion after January 8, 2016.

- II. The distribution of conversion proceeds as proposed by InnovAge is not in the public interest.

InnovAge demonstrates a fundamental misunderstanding of the principles of cy pres and of public benefit foundations when it refers to “the value of the assets which its Board and its management have created through outstanding performance.” InnovAge Letter, p.8. Careful management of public funds does not give an organization the right to determine the future use of those funds after conversion. InnovAge is a 501(c)(3) nonprofit organization whose assets belong to the public, in large part because the public contributed funds to and otherwise subsidized its operations, through tax-exemptions granted by federal, state, and local governments, through Medicaid and Medicare dollars, and through grants from other health-related foundations.

Conversion proceeds are public funds, and it is essential therefore that the Attorney General consider the efficiencies, independence, and mission of the receiving entity before approving a plan for their distribution. In addition, given the public interest at stake, the decision should be made only after receiving input from affected communities about their needs and priorities.

- A. The selection by InnovAge of its own foundation fails to adequately consider whether the proposed foundation has the infrastructure and experience to manage funds in a manner that does not diminish the public benefit.

The entity selected must have or be able to develop the infrastructure necessary to manage hundreds of millions of dollars in conversion proceeds. The InnovAge Foundation is a small foundation. Its assets did not exceed \$ 2,507,386 between 2010 and 2014 (*See Total Community Option Foundation 2012-2014 990s at Guidestar <http://www.guidestar.org/organizations/26-2700185/total-community-options-foundation.aspx> and Independent Auditor’s Reports and Consolidated Financial Statements filed with Plan of Conversion*). It also has no history as a grant making organization but instead has a stated mission of supporting InnovAge related activities. Its grant recipients include Total Long Term Care, Inc., InnovAge Johnson Adult Day Program, Inc., InnovAge Greater Colorado PACE, and InnovAge Home Care. InnovAge lacks experience in the outreach, selection processes, administration, and evaluation entailed in grant making on a large scale to external organizations.

With respect to the efficiency of allocating conversion funds to the InnovAge Foundation, David Miller of the Denver Foundation in his affidavit of December 1, 2015, *see* Objections and Comments dated Dec. 10, 2015, App. 2, and Chris Wiant, CEO of the Caring for Colorado Foundation, in his testimony at the December 17 Public Hearing, drew on their substantial experience to make the point that a large existing foundation is more likely to have the structure and good will and community recognition to use funds efficiently. It would be time consuming and expensive for the current InnovAge Foundation to develop adequate staff and infrastructure to manage the conversion funds successfully. InnovAge has not explained why those efficiencies, which would clearly result in more funds going to grant making rather than administration, did not affect their decision-making on foundation choice.

B. The proposed Foundation lacks independence.

In prior filings and in testimony at the December 17 Public Hearing, Objectors provided a thorough basis for the need for an independent foundation, and raised concerns regarding the attendant risks of inurement and private benefit if the conversion foundation is not independent of the for-profit InnovAge. We submit the following additional comments regarding Foundation independence.

InnovAge has proposed a conversion foundation Board of Directors that is composed only of those who have historical and current relationships with InnovAge entities. As an explanation as to why an “insider board” was necessary, InnovAge stated that it had no choice but to engage in a confidential board selection process because it acted prior to filing the Plan of Conversion. Testimony by Maureen Hanrahan, December 17 Public Hearing. InnovAge could have described a process to begin only after the Plan of Conversion is approved, with Directors to be selected according to an AG approved process. There was no need for actual selection before the Conversion Plan was even submitted. Even if Objectors were to concede that confidentiality was necessary, there is no basis for not considering a larger pool of candidates, even if confidentiality were a legitimate consideration.

This “insider” Board, four of whom sit on InnovAge’s Board of Directors, has made all of the key decisions about the structure and operation of the foundation, has drafted a mission statement, proposed bylaws and Articles of Incorporation, and has launched a confidential executive search. While InnovAge has suggested that the current proposed conversion foundation board will serve only until 2017, the proposed foundation by-laws provide that the “initial term” (defined as expiring at the 2017 annual meeting) does not count towards term limitations and Board members may serve up to two three-year terms following the “initial term”. InnovAge Foundation Supplemental Information dated Dec. 8, 2015. In addition, the Board is self-perpetuating, in that initial members may serve staggered terms through 2023, and those initial members retain control over the selection of those who succeed them, as well as additional board members who may be added after the initial transition period. *Id.*, Exh. B, 2.2(b).

Foundation independence means not only that there is no overlap in senior management and executive staff, but also that no members of the Foundation board have fiduciary or any other obligations to the for-profit InnovAge. Not only are there obvious conflicts that arise if there are overlapping directorships between InnovAge and the Foundation, there is also the strong potential for conflict if Foundation executive leadership or board members have a financial relationship with one of InnovAge’s many affiliates. There are more than twenty affiliates described in the InnovAge 2014-2015 Auditors Report and Financial Statements, pp. 9-11. The very large number of InnovAge affiliated entities makes it more likely that a grant making foundation could benefit the post-conversion InnovAge without that being clear to outsiders.

Given the importance of foundation independence and the danger of private benefit to the for-profit entity or private individuals, Objectors are concerned about a lack of clarity in InnovAge’s statement that there will be no overlap between InnovAge and the new foundation. The

InnovAge Letter states: “There will be no overlap of management. Neither InnovAge management nor any Welsh representative will serve on the Foundation Board.” The InnovAge Letter, p. 8. Ambiguities remain as to what entities are encompassed by “InnovAge” and to what positions the term “management” extends. The letter generally uses the term “management” to refer only to executive leadership, rather than to executive leadership and board members; and the term “InnovAge,” generally refers only to the umbrella entity, and not necessarily its component parts.

## **REQUESTS**

To ensure that independence extends to both board members and leadership of all relevant entities, Objectors propose that InnovAge, the InnovAge Foundation, and Welsh each be required to certify the following as a condition of approval of the conversion:

No member of management or the board of directors of InnovAge or the InnovAge Foundation, or any InnovAge affiliate or associated entity has received or will receive any compensation or consideration of any sort from any source as a result of the conversion, except for management or staff expected to be retained only for a transition period not to exceed 9 months, and at a rate of compensation not to exceed their current level of compensation.

- C. The receiving foundation should benefit the frail elderly and disabled communities in the geographic areas in which the converting entity operated.

At the Public Hearing and in its December 26<sup>th</sup> letter, InnovAge for the first time states that the Conversion Foundation should be free to make grants in any state, because, it says, most of its value has been derived from federal Medicaid and Medicare dollars. InnovAge PowerPoint Presentation from Public Hearing on December 17, 2015 (hereinafter “InnovAge PowerPoint”), p. 40 and InnovAge Letter, p. 9.

First, this argument ignores the tax benefit that as a nonprofit doing business in Colorado, InnovAge received from the state and municipalities. Second, it ignores the fact that InnovAge’s value was earned largely from federal dollars allocated to specifically serve Colorado Medicare and Medicaid enrollees. Third, Medicaid is a matched program and Colorado’s general fund pays approximately fifty percent of the cost of serving Medicaid enrollees. Fourth, the donor list in InnovAge’s 2014 Annual Report shows that almost all of the most significant donors to InnovAge, those contributing \$50,000 or more, were Colorado donors. Among them were: Community First Foundation, Mabel Y. Hughes Foundation, Kaiser Permanente Colorado, Mile High United Way, Rose Community Foundation, Caring for Colorado Foundation, The Colorado Health Foundation and a family fund managed by The Denver Foundation. (InnovAge Letter, Attachment 1). In addition, it is InnovAge’s Colorado tax-exempt status that has allowed it to float over \$37 million of tax-exempt bonds at a below-market rate of interest.

Finally, and perhaps most significantly, the doctrine of cy pres proscribes general limits on how a receiving entity of a conversion may spend funds. If charitable assets are to be used “as nearly as possible” to the purposes for which they were initially created, the InnovAge assets should be

used to serve the needs of the frail elderly and disabled in the same “community,” specifically Colorado and to a much lesser degree, perhaps New Mexico and California. InnovAge’s proposal that conversion foundation funds ought to “be open to all organizations that serve the frail elderly and/or address aging issues in all markets InnovAge serves” raises questions as well about the independence of the foundation going forward. InnovAge PowerPoint, p. 40. While the InnovAge Foundation was originally established to support InnovAge’s business operations, it should not serve that purpose post conversion.

An additional concern is that if, as InnovAge suggests, Foundation funds are to be distributed across the nation, there is little or no room for community participation in foundation decision making. The most reasonable definition of community in the case of InnovAge is the frail elderly and disabled in the geographic area served by the pre-conversion InnovAge. Redefining community as all frail elderly and disabled nationally would render the idea of community meaningless. How would community input be solicited and structured with a national catchment area? How would community be defined and identified? The result would likely be that a community voice would be attenuated or absent.

A 2001 study of conversion foundations found that most funded in a limited geographic area.

“Because of both their origins and their geographic grant making restrictions, these foundations are often poised to play important roles in both raising an awareness of community health needs and responding to them.” (Assets for Health: Findings from the 2001 Survey of New Health Foundations, March 2002, p.18. Available at:

<http://www.gih.org/files/usrdoc/2001%20Conversion%20Report.pdf>). Community Catalyst and Consumers Union write that the geographic area should be that which is served by the converting nonprofit corporation, though rigid limitations to town or county boundaries are disfavored. In *Conversion Foundations: Defining Mission and Structure*. Washington, DC and Boston: Consumers Union of US, Inc. and Community Catalyst. Available at [http://www.communitycatalyst.org/doc-store/publications/conversion\\_foundations\\_defining\\_mission\\_and\\_structure.pdf](http://www.communitycatalyst.org/doc-store/publications/conversion_foundations_defining_mission_and_structure.pdf). All of Colorado’s conversion foundations focus their grant making in Colorado.

Other examples from the healthcare field are illustrative. In the sale of Community First Foundation’s 50% interest in the Exempla joint venture to Sisters of Charity of Leavenworth, Kansas (SCL), Attorney General Suthers required that no proceeds be transferred out of state, and imposed a reporting requirement certifying the same. Although the review was subject to the nonprofit provisions of the hospital conversion act, it shows a special sensitivity to not moving proceeds of a nonprofit out of state. Finding of No Material Change in Charitable Purpose: In the Matter of the Exempla Healthcare System Membership Transfer, Dec.27, 2007. Available at <http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/oExemplaFinal.pdf>. In 2008, the Colorado Insurance Commissioner required Kaiser Permanente to devote its excess reserves (earned here in Colorado) to Colorado consumers rather than sending them to California (A. Svaldi, Kaiser returning \$155 million to clients. The Denver Post, June 25, 2008. Available at: [http://www.denverpost.com/headlines/ci\\_9686308](http://www.denverpost.com/headlines/ci_9686308)).

An Attorney General's authority to apply charitable trust principles to the assets of a nonprofit corporation or proceeds from the sale of those assets – in this case, to a nonprofit buyer – was clarified in Banner Health Systems v. Long, 2003 S.D. 60, 663 N.W.2d 242 (2003). Following that decision, and consistent with cy pres principles, a settlement was reached that restricted those assets to North and South Dakota, where Banner Health had operated facilities. Banner Health reaches settlement with North Dakota attorney general, AHA News Now, Dec. 16, 2003. Available at: <http://news.aha.org/article/banner-health-reaches-settlement-with-north-dakota-attorney-general>.

The application of cy pres to geographical scope is well-established. *See* Lockwood v. Killian, 179 Conn. 62, (Conn. 1979), In re Metropolitan Baptist Church of Richmond, Inc., 48 Cal. App. 3d 850 (Cal. App. 1<sup>st</sup> Dist. 1975), and more generally, Pacific Home v. County of Los Angeles, 41 Cal. 2d 844 (Cal. 1953), cited by Banner Health for the proposition that “assets of a corporation organized solely for charitable purposes must be deemed to be impressed with a charitable trust . . . notwithstanding the absence of any express declaration by those who contribute such assets as to the purpose for which the contributions are made. In other words, the acceptance of such assets under these circumstances establishes a charitable trust for the declared corporate purposes as effectively as though the assets had been accepted from a donor who had expressly provided in the instrument evidencing the gift that it was to be held in trust solely for such charitable purposes.” Banner Health at 31.

The 2001 Survey of New Foundations report cited above provides specifics that show that a lack of geographical restrictions is quite rare, though it is a virtual certainty that most or all converting healthcare entities – hospitals, health plans, and insurance carriers – would have benefited significantly from federal funding.

While New Mexico and California may have a claim to a small share of the proceeds, the majority of the funds were earned as a result of the Colorado PACE operation and must serve Coloradans. The Colorado Attorney General should direct that the proceeds may be applied outside Colorado only to the extent she determines that the share of proceeds allocated were earned outside Colorado. As one consideration of the proportional role each state has played in creating value, Colorado PACE has operated since 1990, the New Mexico PACE program since 2004, and the San Bernardino facility only since April 2014. InnovAge Letter, Attachment 1.

The 2001 survey findings cited above state, in discussing the issue of geographic limitations on foundations, that: “[S]ome fund in several states, while others fund solely in their own states. Many others fund only in a limited number of counties or cities. In the 2001 survey, 121 of the 130 foundations indicated that they did indeed have limited geographic areas within which they funded.” Assets for Health at 16.

As important as targeted funding by geographic community, is the definition of the population to be served. InnovAge describes itself as “an organization devoted to helping seniors and disabled individuals.” InnovAge Letter, p 1. Indeed PACE programs are designed to serve those Medicaid and Medicare eligible persons over the age of 55 who need assistance in order to maintain their lives in the community. Despite that, InnovAge's plan for the foundation focuses almost

exclusively on the elderly population. Exhibit B of the Plan of Conversion and the Draft Articles of Incorporation provided in the December 8, InnovAge Letter define the foundation as “funding mission-driven, senior care and other related initiatives that improve community services directed toward the aging population and associated caregivers.” InnovAge Foundation Letter, Exh. B.

In their filings before the public hearing, in the public hearing itself, and in their December 26, 2015 letter, InnovAge omits or minimizes the role of this PACE-eligible community. It is particularly alarming that InnovAge’s presenters at the hearing, Maureen Hanrahan, Marco Chayet, and Maureen Hewitt, failed to mention the disability community, despite the fact that the hearing was well-attended by people with disabilities, and at which several of those who testified referred to their disabilities. The Medicare-Medicaid eligible disability community over age 55 is a core constituency of PACE programs.

## **REQUESTS**

Objectors request the Attorney General:

Reject Total Community Options Foundation, FirstFifty Initiative as the recipient of the conversion proceeds and establish a public process to determine the best allocation of the funds, whether through distribution to a new and completely independent foundation, to an existing Colorado health foundation, or to a nonprofit community entity or entities that serve Colorado’s (and to a proportional extent possibly New Mexico and California’s) frail elderly and disabled individuals.

Establish mechanisms to ensure the conversion foundation or any other recipient of the conversion proceeds is independent of the for-profit InnovAge or its successor.

Establish a ten-year monitoring period, whether Total Community Options Foundation – the NextFifty Initiative or another foundation(s) or entity receive the conversion funds; the monitoring period to include at least:

- a. Annual review of Conflicts of Interest policy
- b. Annual review of 990s;
- c. Annual review of grant making activities;
- d. Annual review of the scope and extent of community involvement and participation in establishing the foundation’s grant making priorities;
- e. Annual review of conflicts of interest between the new foundation and InnovAge or its successor entities;
- f. Annual review of foundation minutes.

Appoint one or more members to the foundation Board of Directors to represent the public interest, after consultation with representatives of the frail elderly and disabled communities, with a specified duty to timely report to the Attorney General any suspected violations of prohibitions imposed on the Foundation with respect to assisting the for-profit organization going forward.

Require the conversion foundation to confine its grant making to Colorado except that, if deemed appropriate, permit a proportional amount of the conversion proceeds and future earnings from those proceeds to New Mexico and California.

Note: the InnovAge Power Point states: “Appropriate post transaction monitoring is welcomed and we are glad to cooperate with the Colorado Attorney General at her discretion to assure proper operations and the achievement of public benefit. InnovAge.” PowerPoint, p. 49. See also InnovAge Foundation letter of December 8, p. 4.

### III. Post conversion monitoring is essential to protect vulnerable individuals

InnovAge suggests there is no need for post conversion monitoring of the converted InnovAge because there are no requirements in SB15-137 for the kind of monitoring suggested by Objectors and others; because review by Centers for Medicare and Medicaid Services (CMS) and the Colorado Department of Health Care Policy and Financing (HCPF) is sufficient; and, because CMS has determined that for-profit PACE entities are equal in service delivery to nonprofit PACE entities. Objectors assert that post conversion monitoring is essential and reply to each of these assertions below.

First, the language in SB15-137 is not a limit on the Attorney General’s authority. The statute expressly provides that the Attorney General retains all her common law authority over PACE conversions. §25.5-5-412(14)(a)(II)(c), C.R.S. That includes the authority to impose post conversion conditions, including monitoring. Conversion monitoring is common in hospital and insurance company conversions and was imposed by Attorney General John Suthers under his common law authority in the 2011 HealthOne Joint Venture proceeding. See 2011 Letter Opinion by Attorney General Suthers. Letter from Geoffrey N. Blue, Deputy Attorney General, to Troy Eid, Esq., Greenberg Traurig LLP (Sep. 8, 2011) (avail. at: [http://www.coloradoattorneygeneral.gov/sites/default/files/press\\_releases/2011/10/13/090811\\_letter\\_troy\\_eid\\_re\\_transaction.pdf](http://www.coloradoattorneygeneral.gov/sites/default/files/press_releases/2011/10/13/090811_letter_troy_eid_re_transaction.pdf)). See also Objections and Comments dated December 10, 2015.

Second, post conversion monitoring to ensure PACE participants are protected is necessary due to the structure of the conversion transaction. Although InnovAge asserts that ongoing monitoring by CMS and HCPF is sufficient, the structure of the transaction between InnovAge and the purchaser, Welsh, may avoid the kind of review typically required of a new PACE entity. Federal regulations provide that during a trial period, defined as the first three contract years, PACE programs are subject to comprehensive annual reviews in order to ensure compliance. These reviews include interviews with staff, participants and caregivers; observation of participant services, grievances and appeals; and any other element that CMS or the state agency finds necessary. 42 C.F.R. §§460.6; 460.190.

InnovAge, however, may not be subject to the “trial period” level of scrutiny. Even though InnovAge will be operated post conversion by a Welsh subsidiary, it is not clear that the form of stock transaction contemplated here (described in the Plan of Conversion at p. 3) will trigger a

requirement for a new contract which would warrant a trial period as defined by federal regulations. In fact, InnovAge’s PowerPoint presentation suggests it anticipates only the San Bernardino PACE site will be subject to annual monitoring. InnovAge PowerPoint, p. 10.

If the post-conversion InnovAge is not subject to “trial period” oversight, InnovAge will not be subject to an annual review and heightened monitoring by CMS. Those entities that have completed the trial period are subject to much less rigorous scrutiny outlined as follows:

Ongoing monitoring after trial period.

(a) At the conclusion of the trial period, CMS, in cooperation with the State administering agency, continues to conduct reviews of a PACE organization, as appropriate, taking into account the quality of care furnished and the organization's compliance with all of the requirements of this part.

(b) Reviews include an on-site visit at least every 2 years.

42 C.F.R. §460.192

At a minimum, the Attorney General should understand the extent of federal and state oversight to which InnovAge will be subject following the conversion.

Last, the May 19, 2015 Report to Congress by the Department of Health and Human Services raises concerns. InnovAge Letter, Attachment 3. InnovAge states that the study demonstrated that for-profit pilot PACE programs were “as successful” as the comparable nonprofit programs. InnovAge mischaracterizes the findings of the report made to Congress. Rather than making any affirmative statement regarding the quality of the for-profit programs, the report simply states that it cannot confirm that the for-profit pilot programs provided lower quality or were more costly for the Medicare or Medicaid programs.

The report did find, however, that there were significant differences between nonprofit and for-profit programs on certain quality sub-measures examined. All factors in Tables 2 and 3 of the Report (both concerning quality of care) for which the significance of the difference was at least 5% are listed below. On all measures other than unintentional weight loss, the nonprofits performed better.

- Severe pain (5% significance, less frequently reported for nonprofits)
- Unintentional weight loss (5% significance, more frequently reported for nonprofits)
- Satisfied or very satisfied with overall care (5% significance, more frequently reported for nonprofits).
- Received therapy outside of PACE (10% significance, more frequently reported for nonprofits)
- Satisfied or very satisfied with information received from doctors and with information regarding medications (5% significance, more frequently reported for nonprofits)
- Always got specialist appointment when needed (10% significance, more frequently reported for nonprofits)
- Could not see a specialist (5% significance, less frequently reported for nonprofits)

- Satisfied or very satisfied with specialist care (10% significance, more frequently reported for nonprofits)
- Injured by fall in last 6 months (5% significance, less frequently reported for nonprofits)

The authors of the report stated that they “were unable to conclude that the findings are directly attributable to the care delivered by the PACE organization” because of urban/rural differences and differences in settings. Nonetheless, the report falls short of making an affirmative statement that the for-profit programs were equivalent to the non-profit programs with respect to the quality of services.

Several organizations have urged the Attorney General to require ongoing monitoring. Notable among them is the Denver Regional Council of Governments (DRCOG) which operates the Denver Area Agency on Aging. In its letter dated December 22nd, DRCOG urges the Attorney General to “require a detailed plan to ensure PACE clients have access to an independent, third party and community based advocate to assure the clients’ rights and dignity are protected.” DRCOG Letter to Attorney General Cynthia Coffman, dated Dec. 22, 2015 (Comment 12).

Dr. Alan Lazaroff, a founder of Total LongTerm Care, urges the “highest level of protection for clients” in his letter of December 15th. Lazaroff Letter to Attorney General Cynthia Coffman, dated Dec. 15, 2015. (Comment 8).

Indeed, in her presentation at the Public Hearing on December 17<sup>th</sup>, Maureen Hewitt of InnovAge, discussed the fact that ombudsmen are available to PACE participants living in residential facilities, including nursing homes and assisted living facilities. InnovAge PowerPoint, p. 11. She did not discuss, however, why other frail elderly and disabled individuals in PACE should not also be afforded the same protections.

PACE is designed to provide a comprehensive set of health and long-term care services. People in PACE must demonstrate that they have a nursing home level of need. 42 C.F.R. §460.150(b)(2). This conversion will begin a new era for PACE participants in Colorado. Given the equivocal quality data in the CMS report, the fragility of the population, Welsh’s commitment to keep the same staffing levels in Colorado for only 18 months (InnovAge Letter, p. 5) and the fact that CMS may not monitor the converted entity as closely as it would a new program, we urge the Attorney General to require that PACE participants be afforded an independent ombudsman for at least the first seven years post conversion. We propose seven years because we assume that Welsh may very well sell the company within the first five years

## **REQUEST**

Objectors request that the Attorney General consult with representatives of the affected population including representatives of the senior and disability communities and their advocates, as well as state and county long term care ombudsmen to establish an independent ombuds program, modeled on the long term care ombuds program, to serve clients of the converted PACE entity.

Objectors further request that the ombuds program be independent of HCPF (the monitoring agency) and that Welsh/InnovAge be required, as a condition of conversion, to fund the program at a level sufficient to ensure access to high quality service.

Finally, Objectors request the Attorney General to establish an ombuds program for no less than seven years from the date of conversion.

### **Conclusion**

For the reasons outlined herein and in our earlier submission dated December 10, 2015, we request the Attorney General sustain Objectors' positions and demands and grant the specific requests made herein.

Respectfully submitted,

s/Edward T. Ramey

s/ Elisabeth Arenales

s/Bethany Pray

s/Edwin S. Kahn

**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing was delivered by United States Mail and electronic mail (on January 7, 2016) to:

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## **EXHIBIT 1**

**Innovage Valuation Analysis:**  
**Supplemental Analyses**

Prepared by:  
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## **Executive Summary**

Below I provide additional comments in response to:

- The updated VMG Health Fair Market Value report dated November 24, 2015 (posted on 12/16/15);
- The presentation by Innovage at the December 17<sup>th</sup> hearing; and
- The subsequent letter and additional comments dated December 26, 2015, and subsequently posted.

In summary, I continue to believe that the Fair Market Value of Innovage fails to truly capture, and thus significantly understates, the value of Innovage in the current policy and market environment. Specifically, Innovage's expertise in managing medical care services and long term care services is a valuable intangible asset that is not captured by the "Income Approach" exclusively relied upon by VMG Health.

Below is a quick review of the basis for my opinion:

- First, a quick review of related policy initiatives at the national and state level;
- Next, a review of key comments by Innovage's CEO in her December 17<sup>th</sup> presentation;
- Then, a discussion of the two Fair Market Valuation reports prepared by VMG Health and submitted by Innovage;
- Followed by a brief overview of the market multiple approach used in my earlier report; and
- Comments by Innovage regarding its selection process -- including its selection of Welsh, Carson, Anderson & Stowe, in part, due to its "willingness to pay a market price."

## **Background: Policy Initiatives and Market Dynamics**

As described in my previous report, the federal government is focused on developing coordinated Medicare-Medicaid programs. The Centers for Medicare and Medicaid Services (CMS) are looking for solutions that improve the quality of health care and the quality of life for beneficiaries eligible for both medical care services and long-term services and supports, and that more efficiently manage the sizable expenditures for the frail elderly and disabled beneficiaries.

The Patient Protection and Affordable Care Act (PPACA) created the Center for Medicare and Medicaid Innovation (CMMI) and the Medicare-Medicaid Coordination Office (MMCO). A key joint initiative of CMMI and MMCO is the financial alignment initiative: "The Financial Alignment Initiative is designed to better align the financial incentives of Medicare and Medicaid to provide Medicare-Medicaid enrollees with a better care experience."<sup>1</sup> This initiative is often referred to as the "dual eligible demonstration" program.

The federal initiative requires the partnership of states. And states, facing continual budget pressures, are interested. Medicaid, which is jointly funded by the federal government and the states, covers long term care services and supports in addition to medical care. As the population

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<sup>1</sup> <https://innovation.cms.gov/initiatives/Financial-Alignment/>

ages and the need for long term care services continues to grow, states are increasingly turning to integrated, coordinated services for Medicaid-eligible beneficiaries, services that allow elderly and disabled beneficiaries to remain in their own homes, rather than move to more expensive – and frequently less-desirable -- nursing homes.

### **CEO Hewitt: National Potential for Innovage and PACE**

Given the focus by the federal government and by states, the expertise acquired by Innovage is in demand. That is clear. In fact, Innovage CEO Maureen Hewitt discussed this in her presentation at the December 17<sup>th</sup> hearing convened by the Colorado Attorney General.

The presentation presents Innovage’s vision to be “a **national leader** of person-centric care solutions for aging adults with complex care needs.”<sup>2</sup> Her presentation further states that “If PACE had access to capital, it could become a meaningful solution for the care of the 10.7 million dual eligible clients in the US (750,000 to 1.7M duals are eligible for the PACE program).”<sup>3</sup>

### **VMG Health: Income Approach as the Basis for Fair Market Value of Innovage**

As stated in Ms. Hewitt’s presentation, the potential to expand the Innovage PACE model nationally makes sense in the context of the larger federal and state initiatives. **However, Innovage’s Fair Market Analysis report, prepared by VMG Health and updated on November 24, 2015 (posted on December 16) fails to account for the intrinsic, intangible value of Innovage that would be the basis for such a national expansion of Innovage.** This is because the valuation was based on a methodology that projects Innovage’s current operations projected forward (using internally generated growth estimates), and **not on the value that an external investor might be willing to pay for a platform for national expansion to serving some of the approximately 10+ million dually-eligible beneficiaries in the United States.**

Interestingly, FitchRatings, in a report upgrading its rating on \$33 million of Innovage’s publicly traded debt (by two notches, to A from BBB+), highlighted Innovage’s strong financial performance, capacity and the outlook for its PACE business:<sup>4</sup>

- *“The upgrade to ‘A’ from ‘BBB+’ is driven by the sustained growth in revenues and robust cash flows from continuing operations as well as the ramp-up of IGCP’s San Bernardino facility. Operating and operating EBITDA margins were 9% and 12.5%, respectively, in the fiscal year ended (FYE) June 30, 2015 (draft audit), which is favorable even at the higher rating.”*

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<https://www.coloradoattorneygeneral.gov/sites/default/files/uploads/AGO/Pacecomments/InnovAgePowerPointPresentationDecember172015.pdf>, page 2. Emphasis added.

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<https://www.coloradoattorneygeneral.gov/sites/default/files/uploads/AGO/Pacecomments/InnovAgePowerPointPresentationDecember172015.pdf>, page 7.

<sup>4</sup> <https://www.fitchratings.com/site/fitch-home/pressrelease?id=993315> Also attached as Appendix A.

- *“Fitch attributes continued success to management's ability to grow enrollment while managing utilization and costs through meticulous monitoring of census, staffing, and coding.”*
- *“...Fitch believes the PACE program will become increasingly essential to delivery of healthcare, given the aging population, the goals of healthcare reform to provide coordinated low-cost quality care, and the program's excellent clinical outcomes.”*

These comments -- on Innovage’s strong profitability and overall financial performance, its operational expertise, and the outlook for Innovage’s PACE program – are consistent with my earlier report. **However, these dimensions are missed by the Fair Market Value analyses provided by VMG Health as part of the Innovage Plan of Conversion and subsequent comments, and, thus the VMG Health Fair Market Valuation substantially undervalues Innovage.**

For instance, the original Fair Market Value Analysis prepared by VMG Health (dated July 22, 2014) and included in the Plan of Conversion (filed on October 30, 2015) described using the “Income Approach” to value Innovage. This approach was chosen according to the report because:

*“Unlike the Cost and Market Approaches, the Income Approach evaluates the future economic income stream that is specific to the subject entity and the subject controlling interest.”<sup>5</sup>*

Unfortunately, the Income Approach does not capture the most valuable use of the underlying asset, its organizational expertise, which can be applied to other dual-eligible populations (i.e., disabled beneficiaries who are under 65), to similar populations (i.e., the frail elderly) in different geographies, and/or to dually-eligible individuals in other managed long term care and special needs plans.

Moreover, VMG Health’s report said that a “Market Approach,” which would serve to account for the intrinsic, intangible value of Innovage that could be the basis for a geographic (or even national) expansion, was rejected:

*“Although considered, ultimately no reliance was placed upon the Market Approach as it was deemed that publicly traded insurance providers and related private transactions are not comparable to the subject business from a service line (types of patients cared for) and growth (start-up CA program) perspective.”<sup>6</sup>*

This logic was carried through in the updated VMG Health Report (dated November 24, 2015), which states that:

*“Ultimately, 100% reliance was placed upon the Income Approach (Discounted Cash Flow Analysis) for all three InnovAge service lines (PACE Programs, Homecare and Solutions). It was our determination that the Cost Approach did not provide adequate consideration to the going concern value of the [sic] Innovage’s service lines. Furthermore, the Market Approach was deemed inappropriate as similar publicly traded companies are not*

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<sup>5</sup> VMG Health “Final Report,” July 22, 2014, page 67.

<sup>6</sup> VMG Health “Final Report,” July 22, 2014, page 67.

*comparable from a size or growth standpoint and limited information is available regarding private transactions involving comparable entities.”<sup>7</sup>*

### **Market Multiple Approach vs VMG Health Income Approach**

However, my earlier report (dated December 4, 2015) shows market multiples for:

- Managed care organizations, including Medicare-Medicaid focused managed care organizations;
- Pending managed care organization acquisitions; and
- Eight Medicare-Medicaid focused organizations acquired between November 2012 and October 2015.

Based on analyzing these organizations, pending acquisitions and recent Medicare-Medicaid transactions, I believe that the Fair Market Value of Innovage is **12 to 14 times trailing twelve month EBITDA**.

Based on normalized trailing twelve month EBITDA for Innovage (based on the twelve months ending 6/30/2015), **this range results in a valuation of \$303 million to \$354 million, before including an updated valuation of Innovage’s real estate.**

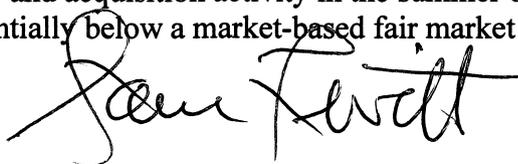
This compares to the originally proposed consideration of \$186.4 million (October 30, 2015 filing, which was based on financial data as of February 28, 2014), and the updated VMG Health Fair Market Value of \$213.5 million (November 24, 2015 VMG Health report, which was based on financial data as of June 30, 2015).

**Note that neither of the VMG Health reports provide details supporting the valuation of Innovage’s real estate, included in the above numbers, cited as \$53.7 million and \$56.6 million, respectively.**

### **Rationale for the Transaction and Selection Process: “Willingness to Pay a Market Price”**

Innovage reports, in its recently posted letter to Attorney General Coffman (dated December 26, 2015) that it solicited bids throughout 2014, resulting in a Letter of Intent with Welsh, Carson, Anderson & Stowe in December, 2014. One of the factors for choosing Welsh was its “willingness to pay a market price.”<sup>8</sup>

Given the significant policy initiatives cited previously – and thus the potential for significant expansion of model to other populations and other geographies – as well as the comparables cited in my earlier report, and the merger and acquisition activity in the summer of 2015, I believe that the proposed consideration is substantially below a market-based fair market valuation for Innovage and should be rejected.



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<sup>7</sup> VMG Health “Final Report,” Executive Summary, November 24, 2015, page 3.

<sup>8</sup> Page 5.

**Appendix A:**  
**FitchRatings Upgrade Press Release**

# Fitch Ratings

## Fitch Upgrades Total Longterm Care (CO) Revs to 'A'; Outlook Revised to Stable

Fitch Ratings-New York-02 November 2015: Fitch Ratings has upgraded to 'A' from 'BBB+' the rating on the following revenue bonds issued by Colorado Health Facilities Authority on behalf of Total Longterm Care, d/b/a InnovAge Greater Colorado PACE (IGCP):

--\$6,670,000 series 2011 fixed-rate bonds;  
--\$26,325,000 series 2010A fixed-rate bonds.

The Rating Outlook is revised to Stable from Positive.

### SECURITY

Bondholders have a security interest in the gross revenues of the obligated group and first lien mortgages on certain assets of the obligated group. A debt service reserve fund provides additional security.

### KEY RATING DRIVERS

**FINANCIAL STRENGTHENING:** The upgrade to 'A' from 'BBB+' is driven by the sustained growth in revenues and robust cash flows from continuing operations as well as the ramp-up of IGCP's San Bernardino facility. Operating and operating EBITDA margins were 9% and 12.5%, respectively, in the fiscal year ended (FYE) June 30, 2015 (draft audit), which is favorable even at the higher rating.

**LIQUIDITY GROWTH:** The rating upgrade also reflects the sharp improvement in unrestricted cash and investments with liquidity metrics that well exceed Fitch's 'A' category hospital medians. The liquidity growth reflects a combination of strong cash flows and collection of aged receivables from the state of Colorado. Liquidity metrics of 204 days cash on hand, 27.3x cushion ratio, and 217% cash-to-debt provides ample financial cushion for unforeseen operating variances.

**CAPITATION RISK:** As a fully capitated Program of All-Inclusive Care for the Elderly (PACE) provider, IGCP is at risk for all care associated with the elderly, 'dual eligible' members it serves, which is a key credit concern. However, IGCP has successfully managed this risk through strong case protocol and utilization management and has restricted internal financial reserves (\$20.6 million at FYE 2015) as a hedge against catastrophic events.

**CONTINUED CAPITAL INVESTMENTS:** Capital spending is expected to remain elevated in 2016 at \$11 million (277% of 2015 depreciation), as several existing facilities in Colorado are undergoing renovations. Fitch expects strong cash flows to support projected capital plans without an impact on liquidity.

**HIGH MEDICARE AND MEDICAID EXPOSURE:** Nearly all of IGCP's revenues are derived from governmental payor sources. While revenues are highly vulnerable to reduction in Medicaid and Medicare reimbursement rates, expenses can also be flexed in response to changes given the high portion of variable costs.

### RATING SENSITIVITIES

**FURTHER GROWTH EXPECTED:** The Stable Outlook reflects Fitch's expectation that Total Longterm Care (d/b/a InnovAge Greater Colorado PACE)'s San Bernardino, CA and Loveland, CO facilities will ramp

up as planned, leading to continued revenue growth and diversification. Due to the inherent risks related to the fully capitated model and dependence on governmental payors unique to the PACE program, further positive rating movement is unlikely in the near term.

## CREDIT PROFILE

Total Longterm Care, Inc. (d/b/a InnovAge Greater Colorado PACE) operates PACE, a Medicare program and Medicaid state option that provides community-based care and services to people age 55 or older who otherwise would need a nursing home level of care. IGCP specializes in provision of care to the elderly through the PACE program, which is a multi-disciplinary approach to meet the healthcare needs of the frail elderly in a highly personalized and community based setting through five day center locations in Colorado and one location in California. IGCP serves over 2,300 participants, and produced total operating revenues of \$171.6 million in fiscal 2015 (draft audit).

### Continued Expansion

In April 2014, IGCP opened up its San Bernardino facility, the organization's first foray into the California market. Management reports that enrollment during the first year was slower than anticipated, as PACE was a brand-new concept to the region. Though behind initial projections, enrollment passed its breakeven point in under 12 months, and was over 200 as of Sept. 30, 2015. Management is targeting to reach 393 participants in fiscal 2016.

Expansion into Loveland, CO is also underway. Approximately \$7.3 million of capital investments have been made, and construction is complete. The facility has received approval from Medicare & Medicaid to open, and anticipates beginning enrollment in November 2015. Fitch views these expansion plans as positive as long as the success of the existing programs can be replicated.

### Solid Operating and Financial Profiles

Financial metrics improved across the board in fiscal 2015 with ramp-up in California and consistently strong results across Colorado operations. Census grew 11.1% over the last year to 2,353 participants from 2,117. Fitch attributes continued success to management's ability to grow enrollment while managing utilization and costs through meticulous monitoring of census, staffing, and coding. Despite its moderate revenue base and reliance on governmental payors, stability is supported by the PACE model, where operators are granted exclusive rights to select zip codes. As a result, IGCP has no direct competitors in its service areas. Other providers of long-term care exist, such as hospitals, home health agencies, nursing homes, and assisted living facilities. However, IGCP's multi-disciplinary approach to providing services is unique and provides a competitive advantage in terms of quality, efficiency, and cost.

### Excellent Profitability

Profitability metrics are excellent, with operating and operating EBITDA margins of 9% and 12.5%, respectively, in fiscal 2015. Strong profitability reflects an improvement in San Bernardino, as increasing enrollment curbed losses to \$1.6 million in 2015 compared to \$4.8 million the prior year. As enrollment has reached a breakeven point, management expects California operations to generate positive net income in 2016 and on, which should further boost overall profitability. Fitch believes consistently strong overall profitability is reflective of IGCP's stable operating platform, flexible expense structure, the program's low capital requirements, as well as management's ability to respond to negative variances.

### Heavy Reliance on Governmental Payors

A key credit concern is IGCP's very high concentration of Medicaid and Medicare revenue in its payor mix. As a specialized provider of healthcare for the frail elderly, IGCP receives Medicaid and Medicare capitated payments for its program enrollees and participants. These two revenue sources, which typically account for more than 95% of the organization's operating revenue, are highly susceptible to federal and state budgetary constraints and potential program modifications. However, Fitch believes the PACE program will become increasingly essential to delivery of healthcare, given the aging population, the goals of healthcare reform to provide coordinated low-cost quality care, and the program's excellent clinical outcomes. IGCP's

increasing importance in meeting healthcare needs of its community somewhat mitigates concerns related to its exposure to governmental payors. Further, risks related to accounts receivable (AR) collectability are limited given the payor base, though timing of receipts may fluctuate.

#### Facility Updates Continue

A total of \$11 million is budgeted for capital spending in fiscal 2016, \$8.5 million of which is allocated to development projects. The majority of the funds will be spent on updating facilities at Chambers, Pueblo, and Cody locations. Fitch believes IGCP's historically strong cash flows should continue to support capital needs without materially affecting liquidity.

#### Strong Liquidity Growth

Unrestricted cash and investments grew to \$85.2 million at June 30, 2015, up from \$55.9 million one year prior. Part of the growth is attributable to a large payment received as a good faith payment from Colorado to offset AR processing issues. As a result, AR declined to \$8.4 million at FYE 2015 from \$18.2 million at FYE 2014. Fitch also notes reported and estimated claims payable are consistently at a manageable level, most recently reported at \$5.8 million (FYE 2015).

Liquidity metrics are very good, with 204 days cash on hand, 27.3x cushion ratio, and 217% cash-to-debt against Fitch's respective 'A' medians of 205 days, 18.5x, and 144%. This includes \$20.6 million in board-designated reserves set aside to meet any financial obligations arising from catastrophic events associated with its capitation program. Excluding these financial reserves, metrics fall to 155 days, 20.7x, and 165%.

#### Low Debt Burden

Debt load is light with 1.7x debt-to-EBITDA and 25.1% debt-to-capitalization at FYE 2015 compared to Fitch's hospital 'A' medians of 3x and 36.2%, respectively. Coverage of maximum annual debt service by EBITDA is excellent, at 7.2x in 2015.

#### DEBT PROFILE

As of June 30, 2015, IGCP had \$39 million in long-term debt outstanding, consisting of \$33 million in fixed-rate bonds, a \$4 million mortgage, and capital leases. IGCP does not have any swaps outstanding.

#### DISCLOSURE

InnovAge has covenanted to disseminate annual financial statements within 150 days of year-end and unaudited quarterly statements within 45 days of quarter-end through the Municipal Securities Rule Making Board's EMMA system. The system statements include consolidating statements detailing the financial position of the IGCP obligated group.

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### **Applicable Criteria**

Not-for-Profit Continuing Care Retirement Communities Rating Criteria (pub. 04 Aug 2015)

([https://www.fitchratings.com/creditdesk/reports/report\\_frame.cfm?rpt\\_id=868824](https://www.fitchratings.com/creditdesk/reports/report_frame.cfm?rpt_id=868824))

Revenue-Supported Rating Criteria (pub. 16 Jun 2014)

([https://www.fitchratings.com/creditdesk/reports/report\\_frame.cfm?rpt\\_id=750012](https://www.fitchratings.com/creditdesk/reports/report_frame.cfm?rpt_id=750012))

U.S. Nonprofit Hospitals and Health Systems Rating Criteria (pub. 09 Jun 2015)

([https://www.fitchratings.com/creditdesk/reports/report\\_frame.cfm?rpt\\_id=866807](https://www.fitchratings.com/creditdesk/reports/report_frame.cfm?rpt_id=866807))

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