




HEALTHCARE MERGERS AND ACQUISITIONS:

KEY LEGAL ISSUES

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TOPICS WE WILL COVER

1. Overview of the Market
2. Trends in Healthcare M&A
3. Structuring the Deal for Compliance
4. Valuing and Structuring the Deal
5. Tips for Negotiating:
 - Letter of Intent
 - Purchase Agreement
6. Key Employment and Benefits Issues
7. Integration Plans

OVERVIEW

- **Consolidation continues**
- **M&A Activity Grew 70% between 2010 and 2015**
- **Continues to be strong – close 1,000 a year**

TRENDS

- **CINs – clinically integrated networks**
- **Consolidation – groups under same legal umbrella**
- **Private equity – especially in long-term care, medical devices, etc.**

Step 1: CHOW (Change of Ownership) Analysis

- What regulatory requirements require approvals, consents, or notices?**
- Regulatory notices and consents must often be filed 120 days before closing**

STRUCTURING THE DEAL FOR COMPLIANCE

Step 2: Federal Anti-Corruption and Fraud Laws

- No payment of “remuneration” to induce or reward patient referrals**
- No referral of patients to entities with which provider has financial relationship for services payable by Medicare or Medicaid**

STRUCTURING THE DEAL FOR COMPLIANCE

Step 3:

State laws

- **Corporate Practice of Medicine**
- **Noncompete laws**
- **Other licensing issues**

VALUING AND STRUCTURING THE DEAL

Valuing and Structuring the Deal –
determine approximate purchase price and decide between an asset sale and a stock sale, with structure typically driven by tax considerations and liabilities of the seller and financial reporting considerations of the buyer.

VALUING AND STRUCTURING THE DEAL

Valuing the Practice

- Sources – brokers, industry data, service provider data
- Types
 - ✓ Market Approach – use comparable data if available
 - ✓ Income Approach – projects profits into future
 - ✓ Asset Approach – just assets/doesn't account for goodwill

Seller Tips

- Educate yourself about practice valuations
- Advantages of a stock sale
 - ✓ Provides ability to transfer any residual liabilities
 - ✓ May allow better tax treatment
 - ✓ Can make license transfers easier in some states
 - ✓ Can make contract transfers easier, particularly facility leases

Buyer Tips

- Often prefer asset sale
 - ✓ Provides ability to minimize assumption of residual liabilities
 - ✓ Allows depreciation on taxes
 - ✓ Advantages in financial reporting

THE LETTER OF INTENT

The Letter of Intent – sets forth the basic terms of the deal – structure, price, form of payment, assets and liabilities being transferred, management after closing, due diligence period, exclusivity

THE LETTER OF INTENT

Seller Tips

- No adjustments to purchase price (during due diligence or post-closing)
- Cash at closing – limited or no escrows
- Minimal buyer escape clauses
- Employment and management terms
- Negotiate employment arrangements
- Negotiate lease assumption
- Minimize seller's role in integration

Buyer Tips

- Maximum purchase price with due diligence downward
- Deferred purchase price with balance in escrow (promissory note)
- Generous buyer escape clauses (board approval, satisfaction with due diligence, etc.)
- Begin integration planning

NEGOTIATING THE PURCHASE AGREEMENT

Definitive Documents – set forth the detailed legal, financial and other terms of the deal – seller’s representations and warranties, buyer’s rights to recover if breach, employment terms, facility lease or purchase terms, post-closing responsibilities

NEGOTIATING THE PURCHASE AGREEMENT

Negotiating the Purchase and Sale Agreement

Seller Tips

- Limited seller representations
- Limited term of survival on seller representations
- Limited escrow or holdback
- High basket on indemnification obligations
- Low caps on indemnification obligations
- Limited noncompete and other fair trade covenants
- Cost/time to complete negotiations and close

Buyer Tips

- Typically (but not always) provides first draft
- Purchase price negotiated downward based on due diligence
- Standard seller representations with escrow or holdback
- Low or no baskets on indemnification obligations
- High or no caps on indemnification obligations
- Incentives for management to stay (or not)
- Broad seller noncompete and fair trade covenants
- Focus on facility lease assumption or purchase

EMPLOYMENT AND BENEFITS CONSIDERATIONS

Key Employment Issues:

- Required layoffs?
- WARN Act
- Misclassification of employees and contractors
- Noncompetes
- Immigration Compliance
- Extensive disclosures on pay and benefits
- Unions

KEY BENEFITS ISSUES

- Transfer of plans in asset sale
- Successor liability in stock sale
- Retirement plan liabilities
- Employee concerns
 - Employee savings accounts/forfeitures
 - Vacation banks
 - Severance plans

INTEGRATION

Negotiating the Integration - activities after closing to assimilate

Seller Tips

- Emotionally accept that practice will change
- Clearly determine seller's role (if any) in integration
- Announce to staff and colleagues seller's role post-closing

Buyer Tips

- Plan the integration – more important than the purchase process
- Prepare seller for loss of control and need to accept change
- Determine pace of integration, and immediately advise staff and colleagues
- Implement retention or termination of staff or colleagues
- On-site integration team from first day

THANK YOU!



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