

## M & A Transaction in Home Health and Hospice: Compliance and Due Diligence – How Do I Get This Right?

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### Health Care Transactions Overview

- Stages of Health Care Transaction
  - Exploration
  - Letter of Intent
  - Initial Due Diligence
  - Agreement Stage
  - Pre-closing Due Diligence

## Health Care Transactions Overview

- Transaction
- Post-closing Integration
- At what stage or stages does Compliance/Legal get involved?

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## Are you buying or selling?

- What type of transaction (merger/acquisition/divestiture) is on the table?
  - Is there a difference between a merger and acquisition?
- Does the type of agreement matter?
  - One area that will apply whether a company is buying or selling are the CHOW Rules (42 C.F.R. § 489.18 and relevant manual provisions). CHOW applies to ALL providers:
    - Hospitals (including critical access hospitals and long terms care hospitals)
    - Hospices

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## Are you buying or selling?

- Skilled nursing facilities
  - Home health agencies
- Assess if this a CHOW situation – did the responsible legal entity change?
- Should your concerns be different based on the type of transaction?

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“Due diligence is similar to dating before marriage”

Bill Baker

Partner and head of transaction services for healthcare at KPMG

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## What is Due Diligence?

**DUE DILIGENCE** ([www.merriam-webster.com](http://www.merriam-webster.com))

1. *Law*: the care that a reasonable person exercises to avoid harm to other persons or their property failed to exercise *due diligence* in trying to prevent the accident.
2. *Business*: research and analysis of a company or organization done in preparation for a business transaction (such as a corporate merger).

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## What is Due Diligence?

**DUE DILIGENCE** ([www.businessdictionary.com](http://www.businessdictionary.com))

1. *General*: Measure of prudence, responsibility, and diligence that is expected from, and ordinarily exercised by, a reasonable and prudent person under the circumstances.
2. *Business*: Duty of a firm's directors and officers to act prudently in evaluating associated risks in all transactions.

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## Factors Determining Scope of Due Diligence

- Structure of Deal
  - Asset verses Stock
- Nature of Provider
  - Low or high risk
- Will Provider Number be Assumed?
- Size of transaction
  - Don't be fooled by the size
- Does the target company have a Compliance Program?

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## Factors Determining Scope of Due Diligence (cont'd.)

- Terms of Agreement
  - Representations and warranties specific to compliance
  - Right to receive compliance documents
  - Compliance conditions to closing

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## Underlying Premises and Justification for Transaction

- What are you buying?
  - Home Health –
    - Skilled nursing and intensive therapy
    - Personal Care Services
    - Adult vs. Pediatric
    - Population Health Management and Wellness

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## Underlying Premises and Justification for Transaction (cont'd.)

- Hospice
  - Inpatient vs. Outpatient
  - Palliative Care Services
  - Facility based vs. home based

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## Initial Due Diligence

- Does your company have a work group?
  - How often do they meet? How often should they meet? Who leads the group?
  - Does Compliance have a "seat at the table"?
- New division (if acquiring/merging) will be Compliance's "problem"
  - Is the problem fixable before the transaction closes?
  - If the problem is not fixable, this should be a factor in the sale price.

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## Initial Due Diligence (cont'd.)

- Compliance should participate in Due Diligence Request and look into:
  - Is there a Compliance Program;
  - Request target companies' policies and procedures;
  - Billing reviews and audits; and
  - Government investigations and audits:
    - RAC Audits?
    - Does the company have a CIA?

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## Initial Due Diligence (cont'd.)

- Conduct an early pre-acquisition risk assessment on the target.
  - A pre-acquisition risk assessment could also be used as a lens through which to view the feasibility of the business strategy and help to value the potential target.
  - The risk assessment can be used as a base document and assist in determining what might be required in the way of integration post-acquisition.
- Social Media
  - Investigate what is out there.
    - What is the Target company's reputation?

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## Initial Due Diligence (cont'd.)

- Antitrust Matters
- Potential Successor Liability
  - Overpayment
  - 60-day repayment
  - Failed to perform due diligence
  - False claims liability
- Does due diligence/transaction trigger knowledge standard?

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## Initial Due Diligence (cont'd.)

- Initial due diligence – what needs to be prioritized?
  1. Home Health – federal and state moratoriums and 36-month rule
  2. Stock/equity vs. asset purchase
  3. CHOW requirements
    - a. State licensing
    - b. Medicare
    - c. Medicaid
    - d. Third Party Payor Contracts

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## Initial Due Diligence (cont'd.)

5. Technology review – Software review
  - a. Electronic medical record software
  - b. Billing software
  - c. Patient visit capture technology
  - d. Employee time and payroll tracking
  - e. Compliance
  - f. HIPAA/HITECH

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## Initial Due Diligence (cont'd.)

6. Quality metrics
  - a. Home Health
    - i. Home Health Quality Reporting Program (HH QRP)
    - ii. Home Health Star Ratings
  - b. Hospice Quality Reporting Program (HQRP)
    - i. Hospice Item Set (HIS)
    - ii. Hospice Consumer Assessment of Healthcare Providers and Systems (CAHPS®)

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## Initial Due Diligence (cont'd.)

7. Billing and coding review
8. Review of referral source relationships and possible compensation arrangements
9. Employee time keeping requirements
10. Litigation, Audits and Investigations

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## Pre-Closing Due Diligence

- Create Compliance due diligence check list
- Determine Compliance and Operational key timelines in the integration process, for items such as:
  - Regulatory requirements (privacy laws):
    - Will all regulatory requirements stay the same post transaction?
  - HR requirements (background screens, exclusions):
    - What must be in place on day 1?

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## Pre-Closing Due Diligence (cont'd.)

- Contracts (that have a direct effect on Compliance (will a Transition Services Agreement be necessary?));
- Data mitigation (passwords, emails, HIPAA):
  - What processes/security approvals need to be in place on day 1?

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## Pre-Closing Due Diligence (cont'd.)

- Calls with your counter-parts ...
  - Develop relationships and understand history.
- Compliance Program process review:
  - At this point, the basic structure of the Compliance Program should already be known
  - Check for all seven elements
  - Analyze the effectiveness of the program
  - Ensure the right to audit before closing
  - Compliance budget

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## Pre-Closing Due Diligence (cont'd.)

- Board engagement
- Training
- Hotline
- Anti-retaliation
- Impose compliance process up front
- Employment Matters
  - Copies of all personnel policies and all employee handbooks

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## Pre-Closing Due Diligence (cont'd.)

- Copies of all employment contracts (including letters to new hires outlining the terms and conditions of employment and physician recruitment agreements)
- Copies of collective bargaining agreements
- List of all employee terminations within last 36 months
- List of all employee reprimands, license investigations, suspensions, etc.
- Copies of standard agreements which employees are required to sign (confidentiality agreements, conflict of interests, etc.)
- Professional Staff
  - Current and past medical and nursing bylaws, rules and regulations

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## Pre-Closing Due Diligence (cont'd.)

- List of all relationships that the target has with hospitals, nursing facilities, etc.
- List of all formal medical staff grievance proceedings in last three years and all pending processes
- Physicians
  - Employed physicians verses independent contractors
  - List of all medical staff members by specialty, privileges, category of medical staff
  - Medical Directors
    - Contracts

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## Pre-Closing Due Diligence (cont'd.)

- Compensation
  - Services required
- FMV documentation
- Are referrals from physicians tracked?
  - Are gifts to physicians tracked?
- Accreditation
- Sales and Marketing

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## Pre-Closing Due Diligence (cont'd.)

- Medicare Successor Liability
  - Assignment of Medicare Provider Agreements
  - CHOW 42 C.F.R. §489.18(c)
    - An assigned agreement is subject to all applicable statutes and regulations and to the terms and conditions under which it was originally issued, including:
      - Any existing plan of correction;
        - Has Compliance, legal or clinical reviewed?

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## Pre-Closing Due Diligence (cont'd.)

- Compliance with applicable health and safety standards;
- Compliance with ownership and financial interest disclosure requirements; and
- Compliance with civil rights requirements.
- Representation and Warranty Insurance Coverage
  1. Insurer due diligence
  2. Possible sources of coverage

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## Pre-Closing Due Diligence (cont'd.)

3. Coverage Terms
  - a. Coverage limits
  - b. Retention amounts and caps
  - c. Exclusions – VERY IMPORTANT!
    - i. General Exclusions: R&W insurance policy will generally exclude matters known to the insured or disclosed on the disclosure schedules, interim breaches, forward looking statements, covenants, working capital adjustments, asbestos and PCBs, pension underfunding or withdrawal liability, the carry-forward value of NOLs or other deferred tax assets and transfer pricing

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## Pre-Closing Due Diligence (cont'd.)

- ii. Deal Specific Exclusions (May be removed Subject to Heightened Underwriting)
        - a) Regulatory matters (i.e. corporate integrity agreement, compliance with healthcare laws, corporate practice of medicine)
        - b) Data security (cyber breaches, privacy matters)
        - c) Financial statements (including a buy side QofE)
        - d) Patient Care issues (abuse/mistreatment of patients, medical malpractice/ professional liability matters)

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## Pre-Closing Due Diligence (cont'd.)

- a) Employment law violations (violation of wage and hour laws)
- b) Billing or reimbursement practices with respect to Medicare, Medicaid, and other government payors
- d. Cost of Coverage
- e. Impact on Escrow - "Commercially reasonable efforts" / "Material exclusions"

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"Integrating two organization is like trying to build a rocket while its blasting off"

Anonymous

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## Pre-Closing Integration Concerns

- Planning and effort put into integration before the closing is critical to success. Poor post-closing outcomes often start with:
  - Lack of due diligence leading to surprises
  - Delay in planning for integration (all effort put into closing the deal, not digesting it)
  - Too much (or too little) focus on short-term “cost synergies”
  - Uncoordinated, leaderless integration
  - Unrecognized (or ignored) differences in risk profiles and cultures

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## Pre-Closing Integration Concerns (cont'd.)

- Lack of empowered transition management team accountable for results
- Lack of transparency leading to misinformation; distrust from Target personnel
- Out of the above, what can Compliance control or at least influence?

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## Post-Closing Integration / Divestiture

1. Have a Plan for Stand-up "Day 1" organization and stabilization
  - a. Commitment to Executing and Managing the Post Transaction integration plan
  - b. People: Two Compliance / Legal Departments become one ... How do they fit?
    - Develop relationships
    - Evaluate existing policies and procedures
    - Evaluate "scope" of each department (who handles what...)

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## Post-Closing Integration / Divestiture (cont'd.)

- What can items can you merge into one and how fast?
- c. Process:
  - Define a step-by-step process to request information, records, etc. post transition
    - Create form that indicates the reason for the request, contact information, deadline, supporting documentations, etc.
    - Create a quick reference guide for the new operator that provides important phone numbers, email addresses, processes, etc. for needs post transition

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## Post-Closing Integration / Divestiture (cont'd.)

- One point of contact (i.e. team lead or single website/call center) for communication with the new operator
  - Helps facilitate information requests and avoids duplicative efforts to provide information to the new operator

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## Post-Closing Integration / Divestiture (cont'd.)

### 2. Transition Service Agreements (TSAs)

- Divested business units often require TSAs in order to ensure business continuity
- Legal may negotiate the agreement, but Compliance/Operations must own the process
- Several areas during transition have compliance implications:
  - Reimbursement;
  - Records;
  - Access to information;

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## Post-Closing Integration / Divestiture (cont'd.)

- Survey issues
  - Compliance investigations, etc.
  - Notifying families/patients
  - Handling equipment that contains PHI or other sensitive data (i.e. laptop swiping)
3. Vendor partners
- Involve vendors early in the transition process to achieve transition goals / Identify “common vendors”

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## Post-Closing Integration / Divestiture (cont'd.)

- Maintain open lines of communication with vendors about transition plans due to changes in transition dates, expectations, etc.
4. Compliance / Legal Matters in Transition
- Identify liabilities that transition to new operator and remain with legacy operator
  - Resolve compliance investigations, auditing and monitoring activities prior to transition to new operator
  - Determine what compliance risks, if any, will be shared with new operator that may span both operating time periods

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## Post-Closing Integration / Divestiture (cont'd.)

- The Compliance Hotline/Posters
  - Remind employees to remove any hotline posters and other reporting communication that will not pertain to new operator
  - Inform hotline vendor of the operation transition date and provide them with word tracks on how to respond to hotline calls after the transition date (i.e. Does new operator have a hotline or main number?)
  - Develop a process to communicate hotline information post transition to new operator for investigation and resolution

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## Post-Closing Integration / Divestiture (cont'd.)

5. Policies - How company policies will be handled during post transition?
  - Will current operator be required to provide a copy of policies and procedures to new operator? (if so, how - internet access on the first day of transition?)
  - Policy Library – date policies were effective, where they were effective, when revised...
  - Intellectual property, copyright and confidentiality implications of sharing policies with new operator

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## Post-Closing Integration / Divestiture (cont'd.)

### 6. Records – Who, What, Where and How Much....?

- Who is the custodian of records and define the date
- Who will assume cost to retrieve records post transition and for what purpose, cap on costs, etc.
- Determine where records will be stored for reasonable access
- Which records will remain with prior operator vs new operator and for how long

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## Post-Closing Integration / Divestiture (cont'd.)

- Develop a packing protocol for operations transitioning to a new owner
  - What types of paper records will remain on site for new operator vs what will remain with operator
  - Provide instructions on how to index boxes of documents, labeling the boxes, etc.
  - Provide training and several reminder calls and email about when the record retrieval will take place
  - Have an employee from records management accompany records vendor to retrieve records to ensure every office, closet, etc. is accounted for

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## Post-Closing Integration / Divestiture (cont'd.)

### 7. More Records... Electronic Health Records

- Determine what data from the EHR new operators must access post transition
- Work with EHR vendor to determine how to provide a copy of current patient records to new operator
  - HIPAA issues of providing an entire copy of database if new operator never cared for patient
  - Work with new operator and vendor to define date of new operator's EHR database and make sure everyone is in agreement

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## Post-Closing Integration / Divestiture (cont'd.)

- Define which fields will be copied to new operator's EHR database
- Be aware of risks with sharing a EHR database with new operator and/or allowing new operator to document in operator's EHR platform/database
  - Vendor capabilities to "delete data" and create a clean record vary if the data is co-mingled; may create future challenges if data cannot be separated

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## Post-Closing Integration / Divestiture (cont'd.)

- Define process for access to EHR systems post transition
  - Surveyors may need access to operator's database to view pre-transaction patient records; new operator will need to coordinate access with operator
  - Must have a process for access controls and usage parameters for new operator
  - Review agreement with EHR vendor regarding access since new operator is not an employee, contractor, etc.

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## Post-Closing Integration / Divestiture (cont'd.)

- "Other electronic data"
  - Determine which systems have data that new operator must access or need post transition
    - Consider electronic HR systems (payroll...), electronic business documents, contracts new operator will assume, etc.
  - Define how electronic information will be shared with new operator securely
    - For example, PHI should not be saved on unencrypted thumb drives

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## Post-Closing Integration / Divestiture (cont'd.)

- Employees should not email company documents to their personal email account to then access once they transition to the new operator
  - Work with IT and security department to monitor for this activity

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