Regulatory Compliance
Due Diligence in M&A

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First – What are the Elements of a Deal?

- Letter of Intent
- Due Diligence
- Valuation
- Negotiation of Purchase Agreement (Equity or Asset)
- Closing
- Escrow
- Implementation

Structure of Deal Informs Due Diligence

- Asset
  - Avoid liabilities for overpayments, malpractice, unknown claims
  - No minority shareholder claims
  - No unwanted assets or employees
  - Determine if want to assume NPI of provider
- Stock
  - Stock sale provides certain benefits to both parties
  - Transaction directly from the owners
  - Assumed civil and administrative liabilities
Due Diligence: Who, what, when, where, and Why?

- **Definition:** The process whereby an “acquiror” of a business seeks to obtain relevant information about the business being purchased.
  - Key word is “relevant”
  - Due diligence should not be viewed as indefinite.
  - Investigate the areas that will have the greatest effect on achieving the purposes of due diligence

Due Diligence: Who, what, when, where, and Why?

- **Purposes**
  - Determine the risks associated with the business
  - Enable merged entity to operate the business efficiently and with little disruption, and to achieve anticipated synergies
  - Identify particular issues to be addressed in definitive agreement
    - Pre and post-closing conditions?
  - Uncover information that would affect the structure of the transaction or whether to proceed
Due Diligence Overview

• Benefits to Buyer
  • Informed Business Decision to Buy
  • Identify successor liability issues
    • If you assume provider number, liability will flow to buyer. Can’t disclaim liability if you assume provider number.

• Benefits to Seller
  • Informed Business Decision to Sell
  • Necessary in Stock-for-Stock Transactions

Goals of Due Diligence

• Comprehensive Analysis of the Target
• Evaluating Management of the Target
• Evaluating the Transaction
• Deal Structure and Documentation
• Finding the Deal Breakers
• Avoiding Post-Closing Surprises
Due Diligence Request List

In constructing the request list, the following matters should be considered:

- What are the goals?
- Who is responsible for which items?
- What is the deal structure
  - Is it asset or stock?
- How will results be reported?

Due Diligence Request List

Items Typically on Request List

- Corporate Governance
- Management
- Securities Matters
- Indebtedness
- Contracts
- Insurance
- Legal Proceedings
- Labor Relations
- Compliance Program Checklist
- Government Relations
- Intellectual Property
- Employee Benefits
- Financial and Accounting Matters
- Tax Matters
- Environmental
- Real Estate
- Management Information Systems
- Research and Development
Keys Areas of Due Diligence
From Compliance Perspective

- Ongoing government investigations or audits
- Sell-side compliance program generally:
  - Code of conduct
  - Policies and procedures
  - Internal audit function
  - Exclusion screening
  - HIPAA and Privacy
  - Physician contracting process – including FMV assessments

Sample Due Diligence Request List

- See handout
Consequences of Poor Diligence

- Lack of Remedy
- Failure to Address Material Issues
- Failure to Pay a Fair Price
- Potential Liability to Investors and other Parties

Common Mistakes

- Being bashful
- Losing interest
- Not understanding the business
- Failing to Communicate
- Duplicating work
- Not keeping current with negotiations and structure
- Not being organized
- Taking shortcuts
- Losing Objectivity
Sell side: Role of Compliance

- Prepare for potential sale:
  - Up to date policies and procedures?
  - Good tracking mechanism for compliance issues?
  - Review open compliance issues to make sure all are being addressed.
- AVOID SURPRISES BY COMMUNICATING WITH MANAGEMENT AND DEAL TEAM
- When asked, respond to compliance due diligence requests on timely basis.
- Before uploading anything to data room, review, review, review to ensure accuracy and to identify any red flags.
  - Don’t want buyer to make assumptions.
- Be active participant in meetings with buyers so that you can identify and anticipate issues in advance.

Buy Side: Role of Compliance

- Be active participant in ensuring adequate regulatory due diligence request list
  - What would you like to see?
- Review responses to diligence request list to ensure complete. Don't be afraid to ask questions.
- Be an active participant in due diligence calls with the seller's team
- Assist with development of billing and coding audit
- What about consultants to perform audits and reviews? Can you recommend any to deal team?
  - Are there consultants to avoid?
  - Types of issues requiring outside consultants: Billing and coding; FMV?
  - Who engages consultants?
  - What about confidentiality?
Buy Side: Role of Compliance

- How can diligence results help you prepare for post-closing integration?
  - Additional training and education?
  - More audits?
  - Additional policies and procedures?

Pre-Closing Issues and Results of Due Diligence

- Results of diligence can kill a deal
  - Liabilities could lead buyer to walk, or lower deal price.
- Any disclosures needed as a condition of closing? If so, where?
  - OIG
  - CMS
  - DOJ
- Is escrow needed to deal with potential outstanding liabilities?
- Special representations and warranties
Post-Closing Considerations

• Integration and/or consolidation of two compliance programs into one
• Did pre-closing diligence identify any weak areas needing additional attention
  • Audits
  • Overall of physician contracting process
  • Better training and education
  • Revision of any policies and procedures

Questions?

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