

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

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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

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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

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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

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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

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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

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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?

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Due Diligence Request List

Items Typically on Request List

- | | |
|--------------------------------|------------------------------------|
| • Corporate Governance | • Government Relations |
| • Management | • Intellectual Property |
| • Securities Matters | • Employee Benefits |
| • Indebtedness | • Financial and Accounting Matters |
| • Contracts | • Tax Matters |
| • Insurance | • Environmental |
| • Legal Proceedings | • Real Estate |
| • Labor Relations | • Management Information Systems |
| • Compliance Program Checklist | • Research and Development |

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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

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Sample Due Diligence Request List

- See handout

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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

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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

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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.

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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?

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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?

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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

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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

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Questions?

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