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Health Care Mergers and Acquisitions: The Transactional Perspective

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Diligence Strategy

(1) Overview and purpose

Due diligence in connection with health care transactions refers to the process undertaken by the parties—and, in some cases, third parties with an interest in the transaction (e.g., lending institutions)—regarding the operational, financial and legal compliance issues of the parties to the transaction. While the due diligence process most commonly involves the "buyer" examining the "target" or "seller," it is also typical for the seller to conduct—usually more limited—"reverse" due diligence on the buyer.[1] During the diligence process, the parties will provide each other with extensive information (e.g., organizational documents, compliance program information, financials, contracts and licenses and certifications) to allow the party to conduct its analysis, make important financial decisions and determine whether and how best to proceed with the transaction.

The considerations involved with due diligence differ depending on whether it is the buyer or seller that is seeking the requested information. For the buyer, these considerations most often involve:

- determining whether to proceed with the transaction (i.e., a "go" or "no go" decision) and at what price, which will involve an assessment of potential legal exposures and potential inherited liabilities;
- identifying issues that may need to be addressed in the definitive document, such as in the disclosure schedules, pre- or post-closing conditions, indemnification and associated caps and carve-outs; and
- surveying the critical items that will be necessary to close the transaction (e.g., licenses and regulatory approvals) or make the future enterprise successful in a post-closing operational environment (e.g., IT infrastructure compatibility).

For the seller, the considerations can be significantly different and usually involve whether the buyer's offer is bona fide, presents the best offer (especially when bids are solicited from various buyers) and best achieves the goals and objectives of the transaction. In either case, due diligence is a critical component for each of the parties, and their respective governing bodies, to discharge their fiduciary duty of care in determining whether to proceed with the transaction. Importantly, a governing body that fails, through management and advisers, to perform adequate due diligence before a material transaction has failed to satisfy its duty and loses the protection of the so-called "business judgment rule" in its determination to proceed with the transaction.[2]

Although due diligence is a crucial aspect of corporate transactions generally, many aspects of due diligence in the health care context are unique. In addition to discussing some basic and strategic issues to consider in the course of the diligence process, such as timing and staging of due diligence requests, which are especially significant in complex health care deals, the following section addresses those elements of due diligence that are unique to health care transactions, especially as they pertain to health care regulatory liabilities and the associated obligations to affirmatively address compliance issues that may be uncovered in the course of such diligence. For ease of review, this section proceeds as chronologically as possible through a typical due diligence process.

(2) Diligence in phases

There are multiple approaches to the phasing of a diligence review, which are often determined by whether the transaction is a result of a bid process or a private sale, the prior relationship of the parties, the size of the deal, company distress, required timing or other factors. Depending on these factors, diligence may take place in a single phase or in multiple phases. In transactions where diligence is conducted in a single phase, the buyer provides the target with a single, comprehensive diligence request list, and the target provides documents and information responsive to that list or "no comment" if no such responsive items exist.

More commonly, especially in transactions with detailed and iterative due diligence request lists, it is typical to proceed with diligence requests in multiple phases. In the first phase, the buyer provides a request list of critical items that should be prioritized by the target for the "go" or "no go" decision. The specific nature of these items may vary depending on the target's business within the health care industry, but common high-priority requests may include:

- financial information, which requires close coordination between counsel and financial advisers (e.g., substantial write-downs, disclosed liabilities);

- significant commercial exposures, such as restrictive covenants in agreements (e.g., exclusivity obligations, purchase requirements, rights of first refusal) that will limit or impose hurdles on potential transactions; and
- "gatekeeping" legal exposures or potential exposures, and especially those that arise in a health care context, such as active government investigations or qui tam lawsuits, material recoupments from third party payers (both governmental and commercial), or significant deficiencies in meeting licensure or accreditation requirements, which are described in more detail in §2100.03.A.4.

By requesting the high-priority items first, the buyer can ensure that it is aware early in the process of any major issues that might cause the buyer to decide not to proceed with the transaction — or alternatively, lower its offer or exclude certain aspects or business units from the transaction — before investing the time and resources through attorneys and outside advisers to pursue a more intensive diligence review. In addition, a multi-phased diligence approach makes it easier to focus the target's attention on high-priority items, which helps ensure that these items are provided in a timely fashion and do not get lost in the weeds among other, lower-priority diligence requests. Once the high-priority items have been provided and reviewed, if the buyer decides that it still wishes to proceed with the transaction in some form, it can follow up with one or more additional requests for lower-priority information.

Notwithstanding this order of operation, a common pitfall is that the parties focus on the higher-priority information and lose sight of the information that is initially deemed lower-priority. A lower priority request does not mean the request is not a priority. Additionally, the buyer may create frustration with the seller in providing continuous and iterative diligence requests. As a result, it is important for counsel and clients to remain in close communication regarding the status of open diligence requests and whether they have been made.

Similarly, as the parties prioritize diligence requests, attorneys and consultants from the buyer should be aligned in what is considered a high-priority request, which is necessary to avoid conflict duplication. Moreover, an important function of the attorney-client relationship in a transaction, especially in the health care space, is the client's risk tolerance for certain types of exposures and the importance of the transaction to the client's objectives; one client may be willing to accept uncertainty or unknown risks when other clients will not. These considerations are often informed by the health care due diligence budget, the client's overall risk tolerance or the degree of risk within a specific sector of the health care industry, the importance and criticality of the deal to the deal client, or time pressures.

(3) Initial diligence

Before exchanging diligence information or entering the data room, the first step in any diligence process is to gain a high-level understanding of the target and the target's sector of the health care industry. As a preliminary step, buyer's counsel should review any transaction documents that have already been furnished, such as a confidential information memorandum, term sheet or letter of intent. Additional sources for helpful background information may include the target's website, Securities and Exchange Commission filings (for public companies) or publicly available Form 990s for non-profits, UCC searches, litigation docket reports, public charities reports, and any articles or commentary related to the target and its industry.

Counsel can often identify likely areas of significance before the diligence process starts, such as change of ownership and issues that may change financial assumptions or create legal issues. Critically, before due diligence starts in earnest, counsel is usually able to discern answers to several gatekeeping questions that speak to the seller's health regulatory risk profile. These inquiries often involve:

- *Revenue from federal health care programs.* Does the seller derive revenue from federal health care programs such as Medicare and Medicaid? Significant revenue from federal health care programs vastly modifies the risk profile of the seller because it increases the significance of key health care fraud and abuse laws, including the federal Anti-Kickback Statute (AKS), the Stark Law and the Civil Monetary Penalties Law (CMPL).
- *Referrals for designated health services by physicians.* Do the services offered by the seller relate to so-called "designated health services" under the Stark Law or the potential for self-referral for such services by physicians? The answer to this question helps determine whether a Stark Law analysis of financial relationships is warranted, which may vastly complicate due diligence and requires careful scrutiny of arrangements with physician referral sources.
- *Breadth of health care operations.* Does the seller operate in a single sector (e.g., home care) or across multiple sectors or lines of business (e.g., lab, practice management, pharmacy)? Understanding the scope of operations will set expectations as to licensure requirements that need to be examined and the different regulatory risks associated with each aspect of the seller's operations.
- *State operations.* In what states does the seller operate? Health care licensure is primarily a function of state law, and knowing the states in which operations occur will help inform the scope and extent of due diligence.
- *Charitable activities.* Is the seller a non-profit, tax-exempt entity under federal and/or state law? The involvement of nonprofits and tax-exempt organizations will not only require additional tax considerations, but may trigger different regulatory approvals by state attorneys general when there is a substantial disposition of charitable assets.
- *Existing compliance agreements.* Does the seller have a mandatory compliance agreement such as a consent decree, non-prosecution agreement or corporate integrity agreement (CIA)? The existence of these documents is likely to impact how a transaction will need to be structured to avoid application of the mandatory compliance agreement beyond the acquired entity or line of business. CIAs and other mandatory compliance agreements are often publicly available, either on governmental agency websites, attached to press releases from past settlements or included on the court dockets.

Buyer's counsel should also establish an understanding of the competitive marketplace and areas of regulatory enforcement for the target's specific industry. This analysis may require initial research encompassing general background information on the industry and any Office of the Inspector General of the U.S. Department of Health and Human Services (OIG) Work Plans or Fraud Alerts, recent False Claims Act (FCA) settlements or Medicaid Fraud Control Unit/Medicaid Inspector General investigations related to the industry.

(4) Targeted health care diligence

Following the initial due diligence process, it is common to focus on certain topical areas that will either yield the most significant issues to address or provide comfort to the buyer. Typical focus areas include:

(a) Organizational documents

Counsel will ask to review the organizational documents for the target, including the articles of organization, bylaws, governing body meeting minutes and corporate table of organization. Not only do these documents give an important overview of the target's structure and operations, including what entities may be licensed or certified, but they also serve to inform future diligence activities and requests. Specifically, the meeting minutes should provide insight into significant matters that are worthy of governing body consideration, such as financial performance, operational deficiencies and significant compliance issues. Despite the importance of these documents, the target may be reluctant to provide copies of meeting minutes as quickly as they are requested by the buyer. One critical seller-side consideration is whether any portions of the meeting minutes (or associated attachments) contain information that is protected by the attorney-client privilege or other applicable privileges that are especially relevant in the health care context (e.g., state or federal peer review privilege), or that is competitively sensitive. Accordingly, seller's counsel may need to delay providing certain of these materials until these meeting minutes are redacted or a joint defense understanding is reached by the parties.

(b) Detailed financial information

The audited and interim unaudited financial statements of a seller are a fruitful source of information, including company structure, the strength of internal control procedures, sources of revenue, financial reserves, deferred maintenance, significant capital expenditures and major liabilities and obligations, including the target's debt profile. As referenced above, close collaboration between counsel and financial advisers will be essential to reviewing and analyzing this information.

(c) Key health care regulatory risks

Buyer and buyer's counsel should carefully review the documents and information provided by the target that will indicate whether there are any potential issues under health care fraud and abuse authorities, including the AKS, the Stark Law (in health care entities that enter into direct or indirect financial arrangements with referral source physicians for the provision of designated health services) and CMPL, especially its prohibition against offering or transferring remuneration to a Medicare or Medicaid beneficiary that the person knows or should know is likely to influence beneficiary selection of a particular provider.[3] This review is where the proverbial rubber hits the road and serves as a critical area for diligence because even technical noncompliance with certain fraud and abuse laws, especially the strict liability Stark Law, with no scienter element,[4] can give rise to significant regulatory liabilities that will need to be addressed by exiting the transition, by negotiation of the definitive agreement or through self-disclosure.

Diligence requests that help assess compliance with fraud and abuse authorities include material agreements, including contracts with referral sources; supply or service arrangements; donations or grants arrangements; coding and billing activities; and compliance with funding contracts, among other areas. As part of the process of assessing the target for potential fraud and abuse issues, counsel will often conduct a detailed review of all or a selected portion of the target's agreements with

referral sources to determine whether contracts comply with applicable AKS safe harbors or Stark Law regulatory exceptions. As a practical matter, this diligence process often involves completion of a checklist that mirrors the elements of the applicable regulatory safe harbor or exception that is applicable to the arrangement. For example, in the review of a consulting agreement with a referral source physician, the diligence review will entail an examination of the following factors (among others):

- Is there a written agreement?
- Is it signed?
- Is it for a term of at least one year?
- Does it include a listing of the services performed in sufficient detail?
- Are the compensation terms contained in the agreement and set in advance? How are bonuses calculated?
- Are the compensation terms supported by an independent determination of fair market value or a market-based determination that the compensation is reasonable?
- Does the payment made under the agreement match the compensation terms? Or is the compensation paid in some way inconsistent?

When physician service or employment contracts are applicable to the target's activities, the buyer should pay particular attention to the methodology for calculating bonuses to ensure that the methodology is permissible and consistent with fair market value. Depending on the buyer's desired scope of diligence, the fraud and abuse review should start from the target's accounts payable ledger, which will permit the buyer to identify whether all payments to physicians or other referral sources tie back to corresponding written agreements with appropriate compensation terms or whether any remuneration paid is outside, or inconsistent with, written agreements.

(d) False Claims Act

The diligence process should also include an analysis of the target's risk for liability under the federal and state FCAs, including the risk of qui tam (whistleblower) lawsuits. Risk factors for qui tam suits may include disgruntled former employees who were fired in the past few years, particularly where the employee worked in a sensitive area, such as finance or quality, or previously raised concerns. If the target has existing qui tam suits, diligence should include a careful review of the investigative demands, responses to such demands, the legal complaint (if available) and any other documentation to determine the likelihood of success. Diligence may also examine recent employee terminations, exit interviews involving material compliance concerns and, especially after the Supreme Court's 2016 decision in Universal Health Services v. United States ex rel. Escobar,[5] whether the government knew of non-compliance and paid anyway. FCA diligence may also involve conducting a review of regulatory issues that could give rise to overpayments and thus reverse false claims, such as billing and coding compliance. The unique elements of these diligence reviews are discussed in more detail below.

(e) Compliance program

Related to the risk of FCA enforcement is whether the target has an effective health care or corporate compliance program. Compliance programs are critical (and sometimes mandatory, depending on state law or the existence of a CIA or other compliance agreement) in the health care industry, and understanding the target's level of attention to compliance and compliance resources can be extremely helpful in determining the overall level of FCA compliance and enforcement risk. In fact, knowing how much attention a seller pays to its compliance program, including the resources and personnel devoted to ensuring a robust compliance infrastructure with strong internal controls, is often a better indication of regulatory compliance than reviewing every contract in the data room.

Key elements to consider include:

- the effectiveness of the target's chief compliance officer;
- the strength of internal controls around key business risk areas;
- the performance of a compliance committee;
- the types of incidents reported in the compliance log and the target's process for resolving those issues;
- items identified in the target's compliance work plans;
- the content and scope of compliance trainings; and
- the sophistication of the target's auditing and monitoring activities.

Significantly, a robust compliance program will include a risk assessment process that identifies business or regulatory risks for the organization, which will help inform overall diligence by identifying specific organizational risks and how the target has been addressing them. Accordingly, obtaining a sense of a seller's compliance program, and general commitment to compliance, is an important indication of whether there are either known compliance or regulatory issues or unknown compliance issues that could potentially arise post-closing.

(f) HIPAA

Diligence should encompass a review of the target's compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Health Information Technology for Economic and Clinical Health Act of 2009 (HITECH). Key questions include whether the target has a HIPAA privacy officer and security officer and whether the target has recently conducted a HIPAA security risk assessment. Buyer's counsel should also review the target's HIPAA breach logs in order to understand the nature and quantity of the target's reportable events.

(g) Licensure

The diligence process should consider what types of facilities the target owns (e.g., physician offices, skilled nursing facilities, home health agencies) and whether those facilities are required to be licensed, certified or accredited under federal or state law. If licensure is required, it should be confirmed that the facility holds all required current licenses and is in compliance with licensure rules. The diligence process should also include an analysis of any change of ownership notice or approval requirements imposed by the applicable federal or state agencies.

(h) State laws

In light of all of the federal health care regulatory concerns, it is critical not to overlook state law issues, which often present some of the thorniest diligence issues to manage. Of particular importance is whether there are state restrictions on the corporate practice of medicine, which often preclude corporate entities from employing (and sometimes arranging for the services of) licensed professionals. The presence of a rigidly enforced ban on the corporate practice of medicine can have a substantial structural impact on the transaction. Similarly, and often an outgrowth of a corporate practice of medicine restriction, some states impose limitations on the ability of licensed professionals or licensed entities to split fees on a percentage basis with non-licensed professionals or entities.

The impact of these state laws is that arrangements will have to be reviewed for compliance with any limitations and the business deal may have to be re-worked, especially if the transaction involves an investment by an unlicensed entity into a licensed entity.

Another common state law issue is whether there is an applicable "all payer" law that imposes restrictions similar to the AKS, but on all third-party payer arrangements, including those in the commercial sector.

(5) Repayment and disclosure: unique health care considerations

Diligence discoveries, especially in the context of the key health care regulatory issues and the FCA, give rise to unique and especially vexing reporting and disclosure issues. In fact, diligence scenarios can arise (and often do) in which an obligation is imposed on a seller even before the deal is done, and in which diligence obligations continue post-closing. The primary source of this obligation is the FCA, and the so-called "60-day rule" that was enacted as part of the amendments to the FCA through the Fraud Enforcement and Recovery of 2009 and the Patient Protection and Affordable Care Act of 2010.[6] Under the 60-day rule, providers and suppliers to federal health care programs are required to return and report an overpayment within 60 days of their identification. Failure to perfect this disclosure in the required time-frame will give rise to a "reverse" false claim and create the basis for significant FCA liability. A full description of the 60-day rule and reverse false claims, including the intricacies of advising on when and how to make a self-disclosure, is beyond the scope of this chapter, but its very existence should inform how diligence is conducted and the dynamic between buyer and seller regarding specific diligence activities.

The 60-day rule is especially relevant in diligence activities that involve targeted reviews of billing and coding issues to test regulatory compliance or in contractual reviews under the AKS and Stark Law that can give rise to disallowances of Medicare payments based on impermissible referral arrangements. With regard to billing and coding reviews, the desire to review claims to provide assurances of compliance and a "clean bill of health" needs to be balanced against the potential of finding errors, which will result in an obligation of the seller (and an inherited obligation on the buyer) to repay the results. Accordingly, the process of how to structure and conduct such a review is often carefully considered and orchestrated by the parties and involves agreement on the following terms:

- The issues being reviewed. The billing, coding or other issues subject to review should be carefully selected as those areas with perceived regulatory risk or potential governmental scrutiny. Given the potential for diligence findings to give rise to immediate disclosure and repayment issues, the areas selected should be based on risk factors important to the buyer, such as past non-compliance, governmental enforcement priorities or problem areas identified through other diligence activities.
- The appropriate "look-back" period for the review. The buyer may want to insist on a six- or 10-year look-back period to coincide with the limitations period under the FCA, but the seller may request a shorter period that goes no further than the four-year period required by Medicare reopening rules.

- The reviewing party. The buyer and seller will need to agree on who will conduct the review, such as an outside audit firm or law firm, whether the reviewer is appropriately qualified and whether the reviewer will be engaged by seller's counsel to protect the work under the attorney-client privilege. Importantly, subjecting the review work to privilege will limit the ability to disseminate the work product to the buyer or its representative, unless other common-interest or joint-defense understandings are reached.
- Size of the review. The buyer and seller will want to agree on the size and scope of the review. While the buyer may want an expansive review across multiple business areas to give the fullest sense of regulatory compliance, the seller will want to limit the review to avoid the potential for extrapolation or additional review obligations. The common wisdom is that the size of the review should be big enough to matter, but not too big, such that the seller provides no more than "helpful data points." As a practical matter, the parties could agree on a "probe" or "discovery" sample that is not statistically significant and sufficiently random to be subject to extrapolation, but provides a sense of whether the error rate is sufficiently low to demonstrate regulatory compliance.

Given that the FCA and its reverse false claims provisions are the primary source of the legal obligation to disclose diligence issues that indicate potential overpayments from federal health care programs, the 2016 Escobar case is providing new analytical challenges with regard to these diligence issues. Specifically, in Escobar, the Supreme Court held that for a regulatory violation to give rise to FCA liability it must be "material to the Government's payment decision," rather than a statutory or regulatory condition of payment, which is relevant but not dispositive.[7] This materiality standard requires a more nuanced analysis as to whether certain due diligence findings trigger a subsequent disclosure obligation by the seller, and potentially affects the careful orchestration of the diligence process around issues that could give rise to overpayments and thus reverse false claims.

(6) Diligence cut-offs

Buyer's counsel should consult with the buyer to determine an appropriate cut-off date for the diligence review. In some transactions, the diligence cut-off date may be prior to the signing of the definitive agreements. In these cases, the buyer may wish to conduct bring-down diligence (discussed further below) to identify any new diligence information that may become available between the diligence cut-off date and closing. In other transactions, it may be advantageous to set a diligence cut-off date that is simultaneous with the closing date to ensure that the buyer is made aware of any new risks that may arise during the time prior to closing. Regardless of the cut-off date, buyer's counsel should accompany its diligence findings with a caveat that the diligence analysis speaks only to information that was provided by the target prior to the cut-off date.

(7) Diligence updates

In the event that the diligence cut-off date occurs prior to the closing date, the buyer may wish to conduct "bring-down" diligence to identify any additional diligence information that has arisen in the interim. Bring-down diligence is conducted prior to closing to allow the buyer to assess any changes to information provided by the target at the time of signing (e.g., changes to licensure status or amendments of significant contracts) and any significant new information that has arisen after signing (e.g., new government investigations or significant new contracts). If any new issues are identified during bring-down diligence, then, depending on the severity of the issue and the provisions of the definitive agreement, the seller may have the ability to either walk away from the transaction or negotiate an adjustment to the purchase price to account for a newly discovered liability.

[1] In the case of a merger, diligence requests are usually quite balanced between the parties who are assessing the consequences of a combined enterprise. Revenue due diligence commonly focuses on the organizational structure and financials of the buyer, which are designed to assess whether the buyer can consummate the transaction. Reverse diligence may also examine other critical issues to the selling entity, including employee issues, operational issues and charity care. Given the more limited nature of reverse due diligence, this chapter focuses predominantly on due diligence conducted by the buyer, rather than reverse due diligence.

[2] The business judgment rule is a standard of judicial review of corporate director conduct, especially involving sensitive decisions regarding the actions of a corporation. In many states, including Delaware, the rule sets forth a presumption that, "in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action was in the best interest of the company." In re Walt Disney Co. Derivative Litig., 906 A.2d 27 , 52, 37 EBC 2756 (Del. 2006). Thorough due diligence is evidence that the directors were informed, acted in good faith and made a decision that was in the best interests of the corporation.

[3] 42 U.S.C. §1320a-7a.

[4] 42 U.S.C. §1395nn; see also OIG, Comparison of the Anti-Kickback and Stark Law, available at https://oig.hhs.gov.

[5] 579 U.S. ____ (2016), 2016 BL 192168.

[6] 42 U.S.C. §1320a-7k; 42 C.F.R. Parts 401 and 405; 81 Fed. Reg. 7653 (Feb. 12, 2016).

[7] 579 U.S. ____ at *3-4, 2016 BL 192168 (2016). For a more detailed discussion of Escobar, see Robert J. Salcido, False Claims Act: Health Care Applications and Defenses (BNA's Health L. & Bus. Series No. 2400), §2400.02.B.2.b.

Due Diligence Request List

Introduction

This due diligence request list is drafted to be used for a simple, small-dollar transaction involving a general healthcare provider or supplier. In the event the transaction involves a medical device or pharmaceutical company, additional customization may be required. Further, it may need to be further tailored to reflect other unique issues related to the transaction that may need to be navigated early, including, without limitation, tax and antitrust issues. For a due diligence request list specifically tailored to transactions involving urgent care clinics, *see* Adam J. Rogers, P.A., Making Sure the House is in Order: Certain Critical Due Diligence Issues for Buyers and Sellers of Urgent Care Clinics. For discussions of the due diligence process in healthcare transactions, *see* Lisa Atlas Genecov, Healthcare Risk: The Game of the Winning Transaction and Melesa A. Freerks and Benjamin Daniels, Avoiding Transaction Pitfalls:Licensing and Regulatory Compliance, section IV.

The following document was adapted from a form licensed from the American Health Lawyers Association, with annotations and/or revisions by Ropes & Gray, LLC and Bloomberg BNA editorial staff.

Due Diligence Request

Below is a preliminary list of documents and information we would like to review relating to _____ (the "Company"). With respect to the Company's subsidiaries, if any, please provide us with the same type of documentation for such entities, respectively, that we are requesting for the Company pursuant to this request list. This request list has been prepared to facilitate the business and legal due diligence review of the Company in connection with the proposed transaction between _____ and _____. Please note that during the course of our due diligence review we may need to review other materials not described herein. In such instances we will supplement this list or send a separate request.

Where we have requested lists or similar compilations of information, it is our assumption that such lists were previously created by the Company for its internal purposes. In the event any such lists do not exist and would be burdensome to create, or it would be burdensome to provide copies of any other documents requested, please let us know so we can discuss whether there is a more efficient way to obtain the information. Also, when responding to the requests below, please confirm whether you are providing us with all existing documents under each item.

Salary and compensation information in response to certain of the requests below should be provided only to the extent such information is reportable on the Company's tax returns or is otherwise publicly reportable. If such information is confidential and not publicly available, then the applicable diligence responses should be appropriately redacted. To the extent possible, the redactions shall be limited and permit us or our representatives to assess the compensation structure and methodology (e.g., incentive compensation formulas), even if the actual compensation information is redacted. Finally, diligence responses should be redacted of any protected health information (as defined by HIPAA) or other sensitive personal information. To the extent such information is necessary to respond to the below requests, please contact us to discuss a HIPAA compliant process to review, use and transfer such information.

Thank you for your assistance with this process.

[Note: The opening paragraph is critical for setting the expectations for the various steps of the diligence process with the Company. Further, the second to last paragraph covers the redaction of sensitive information that may present antitrust concerns if shared between two competing parties seeking to engage in a transaction. Finally, the last paragraph ensures that no protected health information is shared between the parties even if such parties are allowed under HIPAA to view such data. Parties often find it difficult to ensure that HIPAA-compliant security safeguards are applied to the storage, use and transmission of due diligence information between several parties.]

	Item/Description	Review By	Target Completion Date/Status	Comments
1.	**Corporate Matters**			
	Minutes of the meetings of the governing board (and key committees) and/or advisory board (and key committees) of the Corporation for the last three (3) years.			
	Organization chart (management and corporate structure).			
	Schedule of names under which the Corporation does business.			
2.	**Financial Matters**			
	Internal audit reports for current year and preceding three (3) years.			
	Auditors' letters to management of the Corporation for the past three (3) years and any written responses by management.			
	Schedule of accounts and/or notes receivable and payable owed to or by any related entity to or by any director, officer, employee or their relatives.			
	Detail of accrued and other liabilities for the last five years and as of the most recent interim date, including payroll and employee benefits, workers compensation, health insurance, benefits, pension, taxes, legal and professional fees.			
	List of banking arrangements.			
	Schedule of capital expenditures for the past five years and most recent interim period that includes any ex-penditures on (i) expansion; (ii) technology/process improvement; and (iii) routine maintenance.			
	Schedule of projected capital expenditure needs in a manner similar to that provided above.			
	Detailed schedules on any transaction with related or affiliated organizations.			
	UCC, tax and judgment lien searches.			
3.	**Licenses, Accreditation and Health Planning**			
	Licenses, Permits:			
	Copies of all licenses, permits and certifications, and related correspondence and consent, settlement, corporate integrity, deferred prosecution and other agreements with governmental and regulatory agencies. Identify all waivers which may have been granted.			
	Copies of licensure survey reports (e.g., State of _____ licensing report; Medicare/Medicaid certification reports; Fire Marshal's survey) for last three (3) years and all correspondence and Plans of Correction regarding same.			
	All documents related to any pending or threatened challenge, audit, or recertification relating to the Corporation's licensure status (i.e., notices of deficiencies or administrative complaints or actions).			
	Accreditations:			
	Schedule of all accreditations currently held by the Company and the accreditations previously held within the past three (3) years.			
	Latest accreditation survey reports from a deemed status accreditation organizations and the Company's response to noted deficiencies, or to conditional accreditation, if any. Copy of Statement of Construction, if applicable.			
	Copies of recent correspondence with all deemed status accreditation bodies.			
	All documents related to any pending or threatened challenge, audit, or recertification relating to the Corporation's accreditation status (i.e., notices of deficiencies or administrative complaints or actions).			
	Health Planning:			
	Planning permits, Certificates of Need/Exemption and letters of nonreviewability for the last three (3) years.			
	Pending Certificate of Need/Exemption Applications, if any.			
	All reports of the relevant state agency related to on-site visits and all correspondence related thereto.			

	Item/Description	Review By	Target Completion Date/Status	Comments
4.	**Material Contracts and Commitments**			
	All existing and proposed contracts, leases and agreements, including without limitation: a) Material supply agreements. b) Deeds, agreements and options to purchase land. c) Material leases and subleases. d) Material agreements or other arrangements with insiders or related organizations. e) Material service and maintenance agreements. f) Material installment sale agreements. g) Secrecy, confidentiality or non-compete agreements. h) All loan agreements and other debt instruments, security agreements, guarantees and sale and leaseback agreements, notes receivable and notes payable. i) Material guarantees. j) Physician employment or service agreements. k) Consulting agreements. l) Affiliation and educational services agreements. m) Material joint or group purchase agreements, including basis for all discounts. n) All patient or customer referral agreements. o) Material product/equipment licenses or leases. p) All material agreements with cooperatives, or shared service or joint merchandising arrangements which help the Company operate its facilities. q) All joint venture agreements between the Company and any other entity or person including physicians and physician groups			
	Any agreements between the Company and any management company whereby such company operates any part of the Company's facilities, provides management services, leases employees or provides other management services.			
	All agreements with affiliates, directors, officers and other employees (including employment agreements) with annual payments more than $ _____.			
	Schedule of all managed care and other all third party payor agreements, including annual net revenue contribution. Such schedule shall include a list of all material overpayments and refunds owed to such managed care organizations and third party payers in addition to any material payment denials, appeals or other payment controversies.			
	Third party reimbursement survey reports, correspondence and plans of correction, and audit reports for the last three (3) years.			
	All joint venture, partnership, affiliates and similar agreements (regardless of size and form of entity), including those with physicians or other potential referral sources.			
	Brief description of each financial commitment, including guarantees of another party's obligations.			
	Copies of material software licenses, maintenance agreements or development agreements.			
	List of all consents and notices required under any contract as a result of the consummation of the transaction.			
5.	**Personal Property**			
	Fixed asset register or depreciation schedule.			
	Current inventory schedules (including valuation, turnover, and obsolescence)			
	List of items comprising significant other asset balances.			
	List of all debts, liabilities and obligations that arise out of the operation of the Company's business			
	All telephone numbers, facsimile numbers and e-mail addresses of the Corporation.			
	A schedule of all real property owned or leased by the Company indicating in each case the ownership, location, use and material characteristics of such property.			

	Item/Description	Review By	Target Completion Date/Status	Comments
	All valuations and appraisals of the real property and assets of the Company, including a summary of book and tax basis of assets by major category.			
	Copies of any mortgages on all real property owned by the Company, including all guarantees, security agreements and other documents purporting to create liens, mortgages, security interests, pledges, charges or other encumbrances on real property.			
	Environmental audit reports, environmental evaluations or other assessments (including but not limited to studies, investigations or other reports respecting the presence of hazardous materials (including asbestos) or infectious or hazardous wastes, and presence or condition of underground storage tanks, in, on or under the real estate owned or used by the Company).			
6.	**Labor & Employment**			
	A schedule of employees as of _____, 20__, including name, position, salary or wage, and full-time equivalency.			
	A listing of any labor organizations which represent employees, and copies of any collective bargaining agreements involving those employees.			
	All current job descriptions, including minimum qualifications required for each job category.			
	Schedule of all employee terminations within last twelve (12) months including name, age, race, sex, position, date of termination, reason for termination.			
	Copies of all personnel policies, employee handbooks and employee manuals.			
	Copies or descriptions of plans, policies or practices describing the following benefits to the extent this information is not contained in employee handbooks, personnel manuals or policy statements provided pursuant to other requests contained in this checklist: a) Vacation plan; b) Occupational and non-occupational disability benefits; c) Holidays observed and holiday pay practices; d) Paid funeral or bereavement leave; e) Jury duty; f) Work clothing; g) Personal days, paid rest periods and/or lunch periods; h) Overtime pay; i) Shift differentials; j) Sick pay; k) Severance pay; l) Leaves of absence for family, medical, personal and other reasons; m) Drug and alcohol testing of employees and applicants.			
	Employee communication materials, including: a) Most recent summary plan descriptions (SPDs) and any prior versions; b) Summaries of material modifications (SMMs); c) Memos to employees regarding benefit plans; d) Sign-up forms; e) Election forms (e.g., investments, benefit payments); f) Distribution consent forms and notices; g) COBRA forms and disclosures; h) Retirement plan distribution explanations; i) Loan forms, disclosures and policies; j) Withdrawal request forms; k) Individual account statements (samples); l) Section 402(f) notice (concerning rollover distributions eligible for rollover treatment); m) Other tax disclosure.			
	All current employment agreements (including letters to new hires outlining the terms and conditions of employment), excluding physician employment agreements.			
	Significant contractual arrangements under which employees of an outside contractor are to perform services on the premises on an ongoing basis.			

	Item/Description	Review By	Target Completion Date/Status	Comments
	Agreements and policies with directors, officers and senior management employees (except employed physicians) including confidentiality and non-competition.			
	Any standard agreements which employees have been required to sign regarding such matters as confidentiality, conflicts of interest, non-competition, etc.			
	All material grievances filed by employees in the past year, as well as copies of any arbitration decisions received in the past year.			
	All grievance settlements since January 20__ with current disposition.			
	All EEO-1 reports and/or National Labor Relations Board (NLRB) charges filed during the past three (3) years.			
	A listing and description of all employment claims or charges filed by or on behalf of an employee within the last 12 months, including any litigation currently pending before any state or federal court or before any governmental agency, including, but not limited to, the NLRB, the Equal Employment Opportunity Commission (EEOC), the U.S. Department of Labor (DOL), U.S. Department of Health and Human Services (DHHS), the Occupational Safety and Health Administration (OSHA) and the Office of Federal Contract Compliance Program (OFCCP).			
	A listing of any labor organizations which represent employees, and copies of any collective bargaining agreements involving those employees.			
	A listing of all labor organizations which have sought to represent employees during the past twelve (12) months, including an indication as to the steps each organization has taken to organize the employees, the dates on which those steps were taken, the groups of employees involved, and whether the union filed a representation petition with the NLRB.			
	A description of any strike by the employees of the Corporation during the past three (3) years.			
7.	**Employee Benefits**			

	For each **tax-qualified retirement plan**, or other form of retirement plan, that is sponsored by the Corporation or to which contributions are made by the Corporation, including:
	a) Profit sharing plan(s);
	b) 401(k)/profit-sharing plan;
	c) 401(k)-only plan;
	d) Money-purchase pension plan(s);
	e) Defined benefit pension plan(s);
	f) Multiemployer (union) pension plan;
	g) Multiple employer pension plan;
	h) Any other type of tax-qualified retirement plan.
	Please provide the following:
	i) Each written description of its terms, including plan document, handbook, employee manual, policy and correspondence; ii) Each insurance agreement (health or pension related);
	ii) Each insurance agreement (health or pension related);
	iii) Each amendment to documents listed in items (i) and (ii) immediately above;
	iv) Each determination letter issued by the IRS relating to tax-qualified retirement plans identified in item (i) above;
	v) As to any vacation, salary continuation, personal days or other paid time-off program, the total dollar amount accrued under each such program to date.			

	Item/Description	Review By	Target Completion Date/Status	Comments
	For each **employee welfare benefit plan** ("Welfare Plan") that is sponsored by the Corporation or to which contributions are made by the Corporation, including: a) Medical, surgical, hospital or other healthcare plan/insurance program; b) Dental, vision or hearing benefits program; c) STD, sick leave or other form of salary continuation plan/insurance program relating to injury or illness; d) LTD plan or insurance program; e) Group term or whole life insurance plans, including business travel, accident coverage and accidental death and dismemberment coverage; f) Prepaid legal services plan; g) Unemployment benefits plan; h) Plan for providing benefits in form of apprenticeship or training program, educational benefits, day care center or scholarship funds; i) Educational assistance or tuition reduction program; j) Vacation, personal days and other paid time-off programs; k) Cafeteria plan, including flexible spending accounts; l) Union-sponsored welfare plans; m) Any other type of fringe benefit program. Please provide the following: i) Each written description of its terms, including plan document, handbook, employee manual, policy and correspondence; ii) Each insurance agreement (health or pension related); iii) Each amendment to documents listed in items (i) and (ii) immediately above; iv) Each determination letter issued by the IRS relating to tax-qualified retirement plans identified in item (i) above; v) As to any vacation, salary continuation, personal days or other paid time-off program, the total dollar amount accrued under each such program to date.			
	For each **other type** of employee benefit arrangement, whether involving one (1) or more employees, including: a) Severance pay plan or arrangement; b) Supplemental retirement plan; c) Excess benefit plan; d) "Golden parachute" arrangement; e) Stock option plan; f) Any other written or unwritten special arrangements for senior management. Please provide the following: i) Each written description of its terms, including plan document, handbook, employee manual, policy and correspondence; ii) Each insurance agreement (health or pension related); iii) Each amendment to documents listed in items (i) and (ii) immediately above; iv) Each determination letter issued by the IRS relating to tax-qualified retirement plans identified in item (i) above; v) As to any vacation, salary continuation, personal days or other paid time-off program, the total dollar amount accrued under each such program to date.			
	A description of any oral or written agreement that currently extend, or that in the past have extended, post-retirement medical benefits coverage to one (1) or more employees. Provide the most recent estimate of the present value of the total cost of such coverage.			
8.	**Insurance Claims and Risk Management**			
	List of all insurance policies held and copies of insurance binders.			
	Copies of corporate integrity agreements, deferred prosecution agreements and settlement agreements with governmental authorities.			
	Copies of all Stark Law self-disclosures.			
	Any reports submitted to other Occupational Safety and Health Administration, including any reports relating to occupational injuries or deaths.			
	All workers' compensation and unemployment insurance arrangements.			

	Item/Description	Review By	Target Completion Date/Status	Comments
	Workers' compensation claims for the last three (3) years.			
	Auditors' inquiry letters to legal counsel and replies thereto relating to the Corporation or their operations for the last three (3) years.			
9.	**Environmental Compliance (if applicable)**			
	Actions or correspondence by regulatory authorities pursuant to notices of violation, consent decrees and administrative orders for last three (3) years.			
	Documents evidencing actions by governmental authorities pursuant to environmental regulatory provisions, including: consent decrees, administrative orders, complaints, notices of violation or notices of noncompliance. All correspondence to and from any federal, state or local environmental agency concerning such enforcement actions and compliance with environmental laws.			
	Copies of all internal reports relating to compliance with environmental protection laws, including environmental audits, surveys and reports concerning facilities now or formally owned or operated.			
	Air Pollution – Permits issued by any federal, state or local agency for air emissions, if applicable.			
	Water Pollution – Permits issued by any federal, state or local agency for waste water discharge.			
	Solid and Hazardous Wastes – Notifications of hazardous waste activity, waste manifests and any permits for solid and hazardous wastes.			
	Infectious Medical Wastes – Permits issued by any federal, state or local agency for the treatment, storage or disposal of infectious wastes.			
	Any 104(e) requests or PRP notices issued regarding facilities under Superfund or the Comprehensive Environmental Response Compensation Liability Act (CERCLA).			
	Documentation related to all underground storage tanks.			
	Documentation regarding any known PCBs on owned premises.			
	All material safety data sheets obtained and reported in connection with the requirements of OSHA and any state regulatory agency.			
	All educational materials distributed to employees and training schedules established in compliance with the OSHA Hazard Communication Standard.			
	Policies related to the collection and disposal of solid, hazardous and infectious wastes, including evaluation of the following: a) Incinerators on site, if any; b) Storage on site, if any; c) Transport and disposal arrangements with outside firms; and d) Controls and pretreatment.			
	Agreements and certificates of insurance from any disposal contractors and disposal sites.			
	Licenses, policies and procedures related to radioactive materials. List of radioactive materials used, and review other elements and compounds used in or resulting from activities.			
	Ethylene oxide emissions standards and any information on violations thereof.			
10.	**Medical Staff And Physician Matters**			
	Schedule of all medical staff and allied health professional members by specialty, privileges, category of medical staff, age, admissions/year, licensure status, other hospital affiliations, board certifications, etc.			
	Credentialing records (for medical staff and allied health professionals) for the past three (3) years and a description of the credentialing process.			
	Current medical staff bylaws, rules and regulations.			
	All employment or independent contractor arrangements with physicians or physician groups, whether written or oral, including physician incentive arrangements or agreements, physician arrangements involving loans, guarantees or similar non-salary benefits.			
	Agreements for any kind of professional non-physician service, such as laboratories, x-ray technicians, respiratory therapy, etc.			

	Item/Description	Review By	Target Completion Date/Status	Comments
	Schedule of existing and proposed joint venture, PHO, PO and IPA, MSO or other IDS-type agreements. Include a list of the directors and officers of each organization.			
	Schedule of any known pending or threatened actions against members of the medical staff.			
	Minutes of meetings of the Medical Staff for the last two (2) years.			
	Description of all Medical Staff disputes currently in review or hearing status or closed in the last twelve (12) months.			
	All recruitment agreements, referral arrangements or other agreements with individual physicians or physician groups.			
	If the Corporation has made any interest-free or below market rate loans or guaranteed any loans to members of the medical staff, provide detailed information.			
	Provide detailed information for each professional office building on the following: a. Whether space is limited to members of the Corporation's medical staff or whether space is also available for private physicians or professionals. b. Whether all members of the medical staff are entitled to space on a "first-come first-serve" basis. c. How rent is determined and charged.			
	Please give detailed information about use of the Corporation's facilities by physicians. Please provide details about and any agreements documenting financial and contractual arrangements between the Corporation and any physicians or physician groups.			
11.	**Compliance Matters**			
	Pending or threatened litigation, qui tam actions, audits, claims, investigations, government inquiries, or administrative proceedings (including the OIG, OCR, DOJ, FTC, State Attorney General or other state agencies) including without limitation those actions related to billing and coding, physician arrangements or other violations of regulatory requirements and evaluation of potential liability.			
	Compliance Program materials including policies and procedures and training materials related to compliance with applicable laws and regulations administered by DHHS, DOL, OIG, FTC, FDA, OFCCP, OSHA, EPA, EEOC, ATF, NRC, etc.. Explanation of compliance within corporate governance structure.			
	HIPAA Compliance Program Materials including, without limitation, HIPAA Privacy and Security Policies and Procedures, Notices of Privacy Practices, HIPAA risk analyses, training materials and employee logs and breach logs, copies of business associate agreements; any similar policies and procedures or documents related to state privacy law compliance.			
	Policies and procedures related to background checks and OIG LEIE/SAM exclusion list checks. If the Company, any member of the medical staff or any employee has been accused or convicted of Medicare or Medicaid fraud, provide a description of such accusations and/or convictions.			
	Questionable payments and investment arrangements, especially to or with physicians and/or for less than fair market value.			

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