

COVID-19 IN HEALTH CARE M&A: KEY CONSIDERATIONS FOR YOUR ONGOING TRANSACTION

As our country's health care providers and hospital leadership center their attention on preparing and caring for COVID-19 patients, pending transactions will likely be viewed in a different light. Regardless of where you are in the transaction process, or whether you are buyer or seller, each party to a transaction should consider the impact that COVID-19 may have on your deal, including: (1) whether to adjust the timing; (2) planning for changes in financial picture; (3) extending transition services agreements; (4) updating due diligence and schedules; (5) transitioning meetings from an in-person environment to a virtual environment; and (6) assessing the impact of third-parties.

- 1. Delaying or Advancing the Deal.** In light of this public health emergency, one or both parties may consider advancing to close sooner, or later than originally contemplated. In the event of a delay, the parties should consider whether confidentiality or standstill commitments need to be extended and how to address such a delay or acceleration in a definitive agreement. If the parties have not yet signed a definitive agreement, they should carefully analyze how risk is allocated among the parties. Consideration should be given to: (i) the definition of a material adverse effect, or similar standard; (ii) representations and warranties; (iii) closing conditions; and (iv) the method for updating due diligence and schedules.
- 2. Managing Financial Outlook Changes.** Many transactions include provisions to revise the purchase price at closing based on the financial position of the target entity. Additionally, transactions outside the health care sphere may have certain substantial earn-out provisions. Due to the uncertain and rapidly evolving nature of COVID-19, parties will find it difficult to assess how the virus will impact financial performance. Nonetheless, these questions should be considered sooner than later. For example, what if COVID-19 affects the financial statements in a negative way prior to close? Relatedly, how then should the parties adjust the purchase price, or protect from a change in the purchase price? Will the outbreak and the resulting financial uncertainties delay the delivery of key financial information such as financial statements and balance sheets? The parties may consider entering into a separate written agreement or amending the current agreement as soon as possible to address how the parties will manage the financial uncertainties that must now be considered due to COVID-19.
- 3. Extending Transition Services Agreements.** In the event of a delayed closing or longer transition period, the parties may want to extend certain transition services agreements ("TSAs"). TSAs can range in scope and duration, and are likely drafted to deal with gaps in billing capabilities, or the transition of IT infrastructure. With attention being redirected to care for individuals affected by the pandemic, it is likely that transition activities will slow, and the services provided by the seller may be needed for a longer period of time. The parties should discuss whether to extend the terms of these TSAs and any corresponding compensation adjustments.
- 4. Updating Diligence and Schedules.** If the parties elect to delay closing, they may consider updating due diligence provisions and schedules (particularly if the time between sign and close was originally very short). The updates should also account for what happens if there is a new disclosure that has a material adverse impact on the transaction. It may be in both parties' interest to come to an agreement on the front end, and in writing, how the transaction will progress and detail any new arrangements related to updating diligence and schedules and effects of such updates on the future of the transaction.
- 5. Holding Virtual Meetings.** Social distancing requirements have interrupted and will likely continue to interrupt key meetings and discussions. Where the transaction requires that board members, committees, and other governing bodies hold meetings to make decisions, parties should consider whether in-person meetings are possible. If not, virtual meetings may be utilized but parties should be sure such virtual meetings are permitted in the organization's governing documents, or the party at issue should pass an authorizing resolution. For example, governing documents oftentimes include language about the nature and location (i.e., in person presence, physical meeting location, etc.) of meetings of the governing body. If such requirements are present, obtaining the prior written consent of each member of the governing body may be necessary. This creates a record in the event any member (or other stakeholder) later challenges decisions reached during such virtual meetings.
- 6. The Role of Third-Parties.** Most transactions require action by several third-parties – banks, landlords, state and federal agencies, the

list goes on. Some may be critical to advance a deal and bring it to completion. Take frequent inventory of where each of these third-parties stand. For example, if you're submitting a HSR, know that the FTC's Premerger Notification Office ("PNO") has moved to an e-filing system. Additionally, many Secretary of State departments are operating on longer, or uncertain, processing times for various documents including filings and certified document requests. Consider how your bank is processing wires. Has their authorization process been impacted? What is the lead time required to trigger a transfer? Business is anything less than "usual" these days. Plan accordingly.

It is important to take stock of your ongoing transactions and determine how best to move forward. This could mean pushing the transaction forward faster than anticipated, delaying the next step in the process or reconsidering the transaction in full. Whatever the decision for your organization, being aware of the possible next steps and analyzing how best to protect yourself in an uncertain future can be critical to long-term success.

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Throughout 2020, Hall Render's Mergers & Acquisitions Service Line will be publishing a series of articles identifying important, and often unique, aspects of health care transactions that should not be overlooked. Ranging from real estate to reimbursement, this series is designed to highlight key issues and considerations relating to niche components of health care transactions.

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