

A PANDEMIC LENS ON DUE DILIGENCE IN HEALTH CARE M&A

The events caused by COVID-19 and the pandemic's ripple effects has certainly caused pause and required a renewed approach to most of life's activities. Shockingly, legal due diligence conducted in a health care M&A transaction is not immune from such pause and reassessment. New considerations of novel or previously dormant factors will be required in the due diligence process to ensure a comprehensive review of any health care transaction going forward. Due diligence will become an even more dynamic process as new regulations, government programs, and opportunities for relief are rolled out. In light of these changes, due diligence teams should pay close attention to assessment of the following:

1. 1135 WAIVERS

CMS has issued a number of 1135 blanket waivers applicable to a large spectrum of health care providers as a preventative measure to ensure that access to health care is not negatively impacted during the pandemic. The waivers may be implemented by providers without notification to CMS and covers a waiver of requirements related to Medicare Conditions of Participation, EMTALA, HIPAA, medical records, medical staff and telehealth, to just identify a few.

Sellers should be prepared to offer evidence and documentation of any 1135 Waiver Seller avails itself to during the public health emergency. Such documentation should support the use of the waiver, and in the event the public health emergency has been terminated, ensure the services provided under such waiver are either in full compliance with the legal requirements absent the waiver or have also terminated. The enforcement appetite is yet to be discovered for non-compliant provider functions and relationships operating under a 1135 Waiver. Nevertheless, Buyer should ensure a thorough review of such information and assess any potential liability should a federal agency review or audit the entity being acquired post-closing.

2. STARK BLANKET WAIVERS

In response to the pandemic, **CMS issued blanket waivers** for Stark Law requirements related to COVID-19 physician arrangements. Such waivers exempt hospitals and health systems from sanctions for failure to comply with the Stark Law for certain arrangements provided such activities related to a "COVID-19 Purpose" and last only during the duration of the declared public health emergency. While many providers welcomed the flexibility, the Stark Law blanket waivers are limited and therefore, liability could exist for arrangements that fail to fall within the permitted limitations, scope or duration of such blanket waivers. It is also important that those who avail themselves of the waivers **appropriately document** the arrangements and the reasons for use. Accordingly, transaction due diligence should include:

1. Review of all physician arrangements that the seller entity entered into under the Stark blanket waivers;
2. Review of the seller's policies and processes applied to such arrangements;
3. Assessment of risk of non-compliance due to failure for such arrangements to stay within the intended scope and duration of the waiver; and
4. Review of documentation related to need for the waiver and the applicable COVID-19 Purpose.

Similar to the 1135 Blanket Waivers, it is unknown exactly what the future landscape will be for enforcement and assessment of sanctions for any non-compliant arrangements. Parties to a transaction should assess potential liability include appropriate disclosure schedules and include specific representations and warranties related to potential non-compliant arrangements, use of waivers and compliance with waiver requirements.

3. HOSPITAL EMERGENCY AND DISASTER PREPAREDNESS PLANS

While Hospital Emergency and Disaster Preparedness Plans are certainly not novel, the COVID-19 pandemic has brought to the forefront how important and essential such plans are to the continued functioning of health care entities. Buyers should include in their due diligence requests a comprehensive documentation of the existing emergency and disaster preparedness plan. Buyers should review to assess whether the policies and procedures satisfy state and federal requirements, as well as potential effectiveness. The analysis should also include surveying seller's supply chain management and ability to leverage the supply chain to complement and support an effective

emergency and disaster preparedness plan. As part of the buyer's consideration of such plan, the buyer should include in its post-closing considerations whether any updates should be made or if any capital or cash infusion will be required post-closing to ensure such a plan can be effectively implemented.

4. COVID-19 WORK FORCE CONSIDERATIONS

Issues related to workforce have always been a large portion of any due diligence undertaking in a health care M&A transaction. It is no surprise then that additional diligence should be undertaken in light of the COVID-19 pandemic. A buyer should assess during due diligence a seller's actions related to:

1. Protecting workers who have potential contact with COVID-19 patients by using additional engineering and administrative controls, safe work practices and PPE in compliance with federal regulations and guidance.
2. Implementation of policies and procedures covering COVID-19 related sick leave, personal travel reporting requirements and other outside of work guidelines, and required wellness checks which might include random or routine COVID-19 testing or temperature checks.
3. Reduction in workforce related to reduced elective procedures and associated budget shortfalls.

Analysis of such factors will better position a buyer to understand any potential liability arising from a seller's actions (or inaction) and provide needed information to negotiate the distribution of that liability in the definitive agreements. An understanding of COVID-19 related workforce issues will also allow a buyer to be prepared for any post-closing steps to mitigate any decisions or actions taken by the seller related to its workforce during the pandemic.

5. FINANCIALS AND RELIEF FUNDS

Health care entities have seen a **proliferation of federal, state and local relief funds** and financial resources available to assist health care organizations dealing with the pandemic, including programs under the CARES Act, Advanced Payment Protection Program, federal program grants and others. A seller should be prepared to provide detailed information related to which programs it availed itself of (or plans to do so) and evidence of compliance with the requirements and conditions of each program. In addition to an assessment of how such funds are handled and allocated during the transaction, which is discussed along with the specific financial programs in further detail here, the buyer will also need to ensure the seller's compliance with all the requirements for each funding source. Additionally, a post-closing consideration by Buyer will include continued tracking, monitoring and compliance of each funding source and negotiation of liability between the parties should an audit or review post-closing uncover non-compliance that requires repayment or penalty.

The experience of the pandemic has added and changed aspects of due diligence that anyone undertaking a health care transaction should consider as they review their due diligence process. Additionally, buyers and sellers should be prepared to negotiate resolutions related to potential issues uncovered by these unique due diligence considerations and identify solutions to move the transaction forward.

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Hall Render's attorneys and professionals continue to maintain the most up-to-date information and resources, which are available at our **COVID-19 Resource page**, through our 24/7 COVID-19 Hotline at (317) 429-3900 or by contacting your regular Hall Render attorney.

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