MAY 16, 2022

QUALITY FOLLOWS PREPARATION: 4 KEY STRUCTURAL CONSIDERATIONS IN HEALTH CARE M&A DUE DILIGENCE

As deal work in the health care industry continues at a feverish pace and timelines are condensed, due diligence can often suffer and be overlooked in favor of speed. This can lead to key operational or legal issues getting missed, unintended liabilities on the back end for the Buyer or a more difficult integration process. While the content of due diligence is extremely important, a successful due diligence process must also focus on the structure. Taking the time on the front end to organize and plan appropriately can move the deal faster, result in more tangible and helpful products and allow for greater efficiencies for the review team (and welcomed legal cost savings). Structuring a due diligence process for a single deal, or multiple, can take many forms but should include consideration of (1) identity of the reviewers; (2) setting the stage for the reviews; (3) business objectives and deliverables; and the (4) deal room.

KEY STRUCTURAL CONSIDERATIONS

The following are 4 key structural considerations every organization should be aware of when beginning a due diligence process:

1. **Identity of the Reviewers**. Identify who will perform the due diligence reviews. Will it be done all in-house including by the Buyer's operational leaders? Will outside counsel review all or some of the diligence? What about the need for any consultants? Often organizations will engage various consultants to review specific subsets of the diligence, for example, real estate/environmental, IT, financial and coding/billing. Who will be doing the reviews will guide what deliverables can be expected, the anticipated timeline and the level of instruction required.
2. **Setting the Stage**. Set the stage for your reviewers, including providing pertinent background information and establishing clear objectives and expectations. A higher quality diligence output will result when the reviewers are provided an explanation of the deal structure and timeline/key milestones on the front end and are given the opportunity to understand what their specific role is to avoid duplication and foster collaboration. This is best accomplished through a kick-off meeting and prepared materials, as well as periodic check-in calls. If it is possible for the check-in calls to include multiple operational areas, the reviewers can learn from one another and collaborate on those items that are important to the organization.
3. **Business Objectives**. In addition to setting the stage from a structure perspective, the deal team and the reviewers all need to understand the business objectives and preferences. What does leadership want out of the reviews? Sometimes, a business team will want to know each and every potential problem/pitfall (particularly in a stock/membership deal when the Buyer is taking on liabilities of the target or if there is a desire to delineate specific assets that are being acquired). Some leadership teams have a higher risk tolerance and will set a materiality threshold on what constitutes an issue that needs to be elevated or will rely on strong indemnity in the definitive agreement. All reviewers should be on the same page on these items so as not to spin wheels unnecessarily. This understanding will also drive the critical development of a diligence request list with a scope that fits the deal (in this instance, one size does not fit all) and deliverable expectations from the start. For example, will each and every document reviewed be accounted for in a report, is just a risk report sufficient or something in between? Integration items included? Will these need to be done in phases to keep up with the deal timing? Whatever the answers to these questions are, a clear template that can be used will ensure consistency and a faster product on the back end.
4. **Deal Room**. We would be remiss if this article didn't mention that an organized, well-thought out, well-maintained deal room can make all the difference. Investing in an electronic deal room platform that works for your organization is of huge importance. Then, the simple task of aligning the deal room structure with appropriate folders and permissions to match the diligence request list can make the whole process flow more smoothly with less overall headaches.

PRACTICAL TAKEAWAYS

If an organization aligns the people, the process and the technology, the diligence outcomes will be more efficient and more usable. In turn, the time and effort it takes to set up a diligence process from the beginning of a deal can lead to exponential benefits in the long run.

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