Lions, Tigers and Bears .... Oh My!
Walking through the dark forest of the compliance knowns and unknowns in mergers, acquisitions and divestitures in post-acute care.

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Disclaimer
The views shared today are not necessarily the views of our organizations and are our personal views.
Presented for educational illustrated purposes only.
Key Components of a Compliance Program

- Responsibility of the program assigned to a high level official and a designated Compliance Officer.
- Standards established that clearly define expected ethical behavior that all who work at and for the organization must follow:
  - Code of Conduct
  - Policies and Procedures
- Monitor and Audit high risk areas:
  - Assure corrective action is taken whenever the regulation/standard is not met.
  - Develop disciplinary guidelines to use for those who do not follow the standards.
- Education and Training are essential to assure that everyone understands the organization’s standards and knows the regulations that affect their job.
- Communication is essential to assure that all who work for our organization are knowledgeable about the avenues they have to report compliance related issues.
- Evaluation of the program on an annual basis to assure that the program is effective.
Health Care Transactions

- Stages of Health Care Transaction
  - Exploration
  - Letter of Intent
  - Initial Due Diligence
  - Agreement Stage
  - Pre-closing Due Diligence
  - Transaction
  - Post-closing Integration
- At what stage or stages does Compliance get involved?

Are you buying or selling?

- What type of transaction (merger/acquisition/divestiture) is on the table?
- Is there a difference between a merger and acquisition?
- Does the type of agreement matter?
  - One area that will apply whether a company is buying or selling are the CHOW Rules (42 C.F.R. § 489.18 and relevant manual provisions). CHOW applies to ALL providers:
    - Hospitals (including critical access hospitals and long term care hospitals)
    - Hospices
    - Skilled nursing facilities
    - Home health agencies
  - Assess if this a CHOW situation – did the responsible legal entity change?
  - Should your concerns be different based on the type of transaction?
“Due diligence is similar to dating before marriage”

Bill Baker
Partner and head of transaction services for healthcare at KPMG

What is Due Diligence?

DUE DILIGENCE (WWW.MERRIAM-WEBSTER.COM)

1 law: the care that a reasonable person exercises to avoid harm to other persons or their property failed to exercise due diligence in trying to prevent the accident

2 business: research and analysis of a company or organization done in preparation for a business transaction (such as a corporate merger)

DUE DILIGENCE (WWW.BUSINESSDICTIONARY.COM)

1. General: Measure of prudence, responsibility, and diligence that is expected from, and ordinarily exercised by, a reasonable and prudent person under the circumstances.

2. Business: Duty of a firm’s directors and officers to act prudently in evaluating associated risks in all transactions.
Factors Determining Scope of Due Diligence

- Structure of Deal
  - Asset versus Stock
- Nature of Provider
  - Low or high risk
- Will Provider Number be Assumed?
- Size of transaction
  - Don’t be fooled by the size
- Does the target company have a Compliance Program?
- Terms of Agreement
  - Representations and warranties specific to compliance
  - Right to receive compliance documents
  - Compliance conditions to closing

Initial Due Diligence

- Does your company have a work group?
  - How often do they meet? How often should they meet? Who leads the group?
  - Does Compliance have a “seat at the table”?
- New division (if acquiring/merging) will be Compliance’s “problem”
  - Is the problem fixable before the transaction closes?
  - If the problem is not fixable, this should be a factor in the sale price.
- Compliance should participate in Due Diligence Request and look into:
  - Is there a Compliance Program;
  - Request target companies’ policies and procedures;
  - Billing reviews and audits; and
  - Government investigations and audits:
    - RAC Audits?
    - Does the company have a CIA?
Initial Due Diligence

- Conduct an early pre-acquisition risk assessment on the target.
- A pre-acquisition risk assessment could also be used as a lens through which to view the feasibility of the business strategy and help to value the potential target.
- The risk assessment can be used as a base document and assist in determining what might be required in the way of integration post-acquisition.

Social Media
- Investigate what is out there.
  - What is the Target company’s reputation?

Antitrust Matters
- Potential Successor Liability
- Overpayment
- 60-day repayment
- Failed to perform due diligence
- False claims liability
- Does due diligence/transaction trigger knowledge standard?

Pre-Closing Due Diligence

- Create Compliance due diligence check list
- Determine Compliance and Operational key timelines in the integration process, for items such as:
  - Regulatory requirements (privacy laws):
    - Will all regulatory requirements stay the same post transaction?
  - HR requirements (background screens, exclusions):
    - What must be in place on day 1?
  - Contracts (that have a direct effect on Compliance (will a Transition Services Agreement be necessary?));
  - Data mitigation (passwords, emails, HIPAA):
    - What processes/security approvals need to be in place on day 1?
  - Calls with your counter-parts ...
    - Develop relationships and understand history.
Pre-Closing Due Diligence

- Compliance Program process review:
  - At this point, the basic structure of the Compliance Program should already be known
  - Check for all seven elements
  - Analyze the effectiveness of the program
  - Ensure the right to audit before closing
  - Compliance budget
  - Board engagement
  - Training
  - Hotline
  - Anti-retaliation
- Impose compliance process up front

Employment Matters
- Copies of all personnel policies and all employee handbooks
- Copies of all employment contracts (including letters to new hires outlining the terms and conditions of employment and physician recruitment agreements)
- Copies of collective bargaining agreements
- List of all employee terminations within last 36 months
- List of all employee reprimands, license investigations, suspensions, etc.
- Copies of standard agreements which employees are required to sign (confidentiality agreements, conflict of interests, etc.)

Professional Staff
- Current and past medical and nursing bylaws, rules and regulations
- List of all relationships that the target has with hospitals, nursing facilities, etc.
- List of all formal medical staff grievance proceedings in last three years and all pending processes
Pre-closing Due Diligence

- Physicians
  - Employed physicians verses independent contractors
  - List of all medical staff members by specialty, privileges, category of medical staff
- Medical Directors
  - Contracts
  - Compensation
  - Services required
- FMV documentation
- Are referrals from physicians tracked?
- Are gifts to physicians tracked?
- Accreditations
- Sales and Marketing

Pre-closing Due Diligence

- Medicare Successor Liability
- Assignment of Medicare Provider Agreements
- CHOW 42 C.F.R. §489.18(c)
  - An assigned agreement is subject to all applicable statutes and regulations and to the terms and conditions under which it was originally issued, including:
    - Any existing plan of correction;
    - Has Compliance, legal or clinical reviewed?
    - Compliance with applicable health and safety standards;
    - Compliance with ownership and financial interest disclosure requirements; and
    - Compliance with civil rights requirements.
- Any other liabilities that Compliance should be concerned with?
“Integrating two organizations is like trying to build a rocket while it’s blasting off”

Anonymous

Pre-Closing Integration Concerns

- Planning and effort put into integration before the closing is critical to success. Poor post-closing outcomes often start with:
  - Lack of due diligence leading to surprises
  - Delay in planning for integration (all effort put into closing the deal, not digesting it)
  - Too much (or too little) focus on short-term “cost synergies”
  - Uncoordinated, leaderless integration
  - Unrecognized (or ignored) differences in risk profiles and cultures
  - Lack of empowered transition management team accountable for results
  - Lack of transparency leading to misinformation; distrust from Target personnel

- Out of the above, what can Compliance control or at least influence?
Post-closing Integration

- So your Company has Merged ...
- Stand-up “Day 1” organization and stabilization, is your Compliance Department ready?
  - Execute and manage the integration plans
- Two Compliance Departments become one ... How do they fit?
  - Develop relationships
  - Evaluate existing policies and procedures
  - Evaluate both Code of Conducts
  - Evaluate both Employee Handbooks
- What can items can you merge into one and how fast?
Divesting Part or All of the Company

- Operations Transfer Agreements (OTAs) or Transition Service Agreements (TSAs)
  - Divested business units often require TSAs in order to ensure business continuity
  - TSAs can be expensive and time consuming, so think about if they are really necessary
  - Legal may negotiate the agreement, but Compliance should be involved in process
  - Several areas during transition have compliance implications:
    - Reimbursement;
    - Records;
    - Access to information;
    - Survey issues
    - Compliance investigations, etc.
- Review state requirements regarding change of ownership process, moving and retention of records, notifying residents and families, etc.
- Vendor partners
  - Work with vendors early in the transition process to brainstorm best way to achieve transition goals
  - When possible, keep open lines of communication with vendor about transition plans due to changes in transition dates, expectations, etc.
    - For example, not appropriate for record vendor to pick up records during middle of survey

Divesting Cont.

- Billing, reimbursement and resident trust
  - Define collections efforts post transition
  - How will cash be handled
  - Parameters around sharing provider numbers for reimbursement purposes
  - Define how overpayments or repayments will be handled post transition
  - Auditing and closing resident trust accounts
    - Process to communicate with new operator
    - Unclaimed resident property
- Inventory facilities prior to transition
  - Visit several facilities to determine what records and materials they have on site to develop transition plan
  - Plan must include process for handling equipment that contains PHI or other sensitive data
    - For example, laptops that may contain PHI must be wiped before sold
Divesting Cont.

- Liabilities
  - Be aware of any liabilities that may transition to new operator and what remains with operator
  - Resolve compliance investigations, auditing and monitoring activities prior to transition to new operator
  - Determine what compliance risks, if any, will be shared with new operator that may span both operating time periods

- The Compliance Hotline
  - Remind employees to remove any hotline posters and other reporting communication that will not pertain to new operator
  - Inform hotline vendor of the operation transition date and provide them with word tracks on how to respond to hotline calls after the transition date (i.e. Does new operator have a hotline or main number?)
  - Develop a process to communicate hotline information post transition to new operator for investigation and resolution

Divesting Cont.

- Policies
  - Determine how company policies will be handled during post transition
  - Will current operator be required to provide a copy of policies and procedures to new operator?
    - Intellectual property, copyright and confidentiality implications of sharing policies with new operator
    - If the policies are to be provided, how will they be provided to the new operator?
      - For example, if all policies are electronic and web-based, will the facility have internet access on the first day of transition?
  - Records
    - Determine who is the custodian of records and define the date
    - Who will assume cost to retrieve records post transition and for what purpose, cap on costs, etc.
    - Determine where records will be stored for reasonable access
    - Which records will remain with prior operator vs new operator and for how long
    - Will paper records be picked up for storage or scanned
    - Evaluate risks of leaving records with new operator without a copy
Divesting Cont.

- Electronic Health Records
  - Determine what data from the EHR new operators must access post transition
  - Work with EHR vendor to determine how to provide a copy of current resident records to new operator
    - HIPAA issues of providing an entire copy of database if new operator never cared for those residents
    - Work with new operator and vendor to define date of new operator’s EHR database and make sure everyone is in agreement
    - Define which fields will be copied to new operator’s EHR database
  - Be aware of risks with sharing a EHR database with new operator and/or allowing new operator to document in operator’s EHR platform/database
    - Vendor capabilities to “delete data” and create a clean record vary if the data is co-mingled; may create future challenges if data cannot be separated
  - Define process for access to EHR systems post transition
    - Surveyors may need access to operator’s database to view discharged resident records; new operator will need to coordinate access with operator
    - Must have a process for access controls and usage parameters for new operator
    - Review agreement with EHR vendor regarding access since new operator is not an employee, contractor, etc.

Divesting Cont.

- Other electronic data
  - Determine which systems have data that new operator must access or need post transition
    - Consider electronic HR systems, electronic business documents, contracts new operator will assume, etc.
  - Define how electronic information will be shared with new operator securely
    - For example, PHI should not be saved on unencrypted thumb drives
    - Employees should not email company documents to their personal email account to then access once they transition to the new operator
  - Packing protocols
    - Develop a packing protocol for facilities transitioning to a new operator
    - Document should include what types of paper records will remain on site for new operator vs what will remain with operator
    - Provide instructions on how to index boxes of documents, labeling the boxes, etc.
    - Provide training and several reminder calls and email about when the record retrieval will take place
    - If possible, have an employee from Records Management Department accompany records vendor to retrieve facility records to ensure every office, closet, etc. is accounted for
Divesting Cont.

- **Post transition**
  - Define a step-by-step process to request information, records, etc. post transition
    - For example, create a form that indicates the reason for the request, contact information, deadline, supporting documentations, etc.
  - Create a quick reference guide for the new operator that provides important phone numbers, email addresses, processes, etc. for needs post transition
  - When possible it helps to have one point of contact (i.e. team lead) for communication with the new operator
    - Team lead can help facilitate information requests and needs post transition so multiple people are not duplicating efforts in trying to provide information to the new operator
    - Helpful to include new operator’s corporate contact on individual facility requests so the information can be disbursed from the top down; decreases the number of facilities repeatedly requesting the same information post transition

Always be ready

- The Compliance Department always needs to be ready for the company being sold
- When a potential buyer is looking at your company, the Compliance Department will be scrutinized
  - Audits will be reviewed
  - Investigations will be analyzed
- Make sure that your Compliance Program is ready to be looked out from a third party perspective and that everything you do is up to par to be turned over for someone else to scrutinize
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