

# Overview of the Deal Process: A Roadmap Through the Paper Jungle

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## Agenda

- Pre-Transaction Considerations/ Socialization of the Deal
- Non-Disclosure/Confidentiality/Evaluation Material Agreements
- Letter of Intent/Term Sheet
- Choosing the Appropriate Transaction Model
- Valuation and FMV

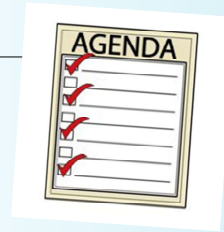


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## Agenda

- Due Diligence
- Typical Key Contract Provisions
- Hidden Risks of Boilerplate Provisions
- Controlling the Process and Managing Expectations
- Post-Closing Transaction Issues



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## Pre-Transaction Considerations Socializing the Deal

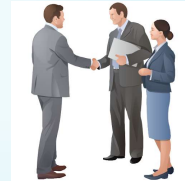
- Is the deal doable?
- Understand the business objectives of the parties
- Establish cultural compatibility
- Identify any significant obstacles
- Governance

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## Pre-Transaction Considerations Socializing the Deal

- Profit /nonprofit
- Ethical and religious directives (ERDs)
- Leadership and management
- Employee/union issues
- Medical staff issues
- Politics and optics



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## Confidentiality/Non-Disclosure Evaluation Material Agreements

Material Covered?

- “Competitively Sensitive” or
- “Confidential Information”?

“Competitively Sensitive” Information

- Need a “Clean-Room” NDA?

Who are the parties?

- Advisors/consultants
- Attorneys/accountants
- employees

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## Confidentiality/Non-Disclosure/ Evaluation Material Agreements

### “Confidential Information” Definition:

- Nonpublic, confidential & proprietary information
- Will you need to specifically stamp “Confidential”?
- Does it matter who discloses it?
  - employees, attorneys, accountants, agents
- Format of disclosure shouldn’t matter, whether:
  - written, electronic, oral or tour of facilities

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## Non-Disclosure/Confidentiality/ Evaluation Material Agreements

### Confidentiality Exclusions -- information which:

- was known to the recipient before the receipt of such information;
- becomes known publicly other than through the recipient;
- is learned or developed by the recipient independent of the discloser’s information; and
- which becomes known to the recipient on a non-confidential basis from a source that is not prohibited from disclosing such information.

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## Non-Disclosure/Confidentiality/ Evaluation Material Agreements

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### Prohibited Use/Disclosure

- limit to evaluate for the transaction
- not use for any other purpose
- not disclose to 3<sup>rd</sup> parties

### What if the recipient is compelled by Court to disclose?

- give discloser sufficient notice so can attempt to obtain a protective order

### Time Period to keep Confidential?

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## Non-Disclosure/Confidentiality/ Evaluation Material Agreements

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- Right to obtain Temporary Restraining Order or Injunction on Breach?
- Venue
- Choice of Law
- Return or destruction (with certification) of information on termination

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## Non-Disclosure/Confidentiality/ Evaluation Material Agreements

### Non-solicitation

- Employees
- Referral Sources
- Customers/Facilities

### Non-compete?

### Standstill Provision

### Sample Provisions:

**See Exhibit A in outline**



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## Letter of Intent/Term Sheet

### Generally

- Sets out material terms and schedule

### Structure

- Asset Sale
- Stock or Membership Interest sale
- Joint Venture/Joint Operating Agreement/Joint Operating Committee

### Price

- Fixed Price
- Formula Price

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## Letter of Intent/Term Sheet

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- Payment Terms
- Collateral
- No-Shop/Standstill
- Non-solicitation
- Break-up Fee?
- Publicity



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## Letter of Intent/Term Sheet

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- Closing Date
- Contingencies
- Choice of law
- Confidentiality (need for BAA?)
- Binding/Non-binding Provisions

Form LOI: **See Exhibit B in outline**

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## Choosing the Appropriate Transaction Model

### Typical Models

- Non-Profit/Tax-Exempt Parent/Holding Co.
- For-Profit Corporation
  - Sub-Chapter S - Captive PC's
- Limited Liability Company
  - Treated as a partnership for federal tax purposes
  - Can elect "check the box" corporate status

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## Choosing the Appropriate Transaction Model

### Typical Models continued . . .

- Joint Venture
- PSA (Synthetic Affiliation)
  - Clinical Co-Management
- Due Diligence Results may influence choice of Model



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## Valuation and FMV

### Legal Significance

- Tax
  - Tax-Exemption
  - Private Benefit/Inurement
  - Allocation of Purchase Price
- Fraud and Abuse
  - **Stark** (monitor interpretation of Final Rule)
  - **Anti-Kickback Statute**  
(monitor Safe Harbor developments)



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## Valuation and FMV

### Valuation Methodologies

- Income Approach
- Asset Based Approach
- Market Approach

### FMV vs. Commercially Reasonable

- Stark requires Both
- Professional Services - Equipment - Office Space

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## Valuation and FMV

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### Remain Engaged in the Process

- Coordinate with Appraiser
- Work Product/Attorney-Client Privilege?
- Review 'Draft' Analysis/Reports
- Question the Business Assumptions
- Do not assume accuracy
  - Use of Local/Regional/National Market Data; Client Data

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## Due Diligence

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### Generally

- It's all about Disclosure
- Establish a data-room
- Sample Due Diligence Request – **Exhibit C**

### Identification of Assets/Business

- Tangible Assets
  - fixtures, furniture, equipment, cash, a/r, deposits, bank accounts, leases, real estate, inventory, supplies, software, patient records (active only?)
- Intangible Assets
  - Goodwill, name, telephone #, website, intellectual property

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## Due Diligence

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### Identification of Liabilities

- Lines of Credit, Loans
- Equipment & real estate leases
- Accounts Payable
- Compliance Audits/ Billing & Coding Audit
- Lawsuits
- Contingent liabilities
- Environmental Issues
- Employment Issues

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## Due Diligence

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### Identification of Agreements

- Leases
- Consulting and Employment
- Payer/Hospital Agreements

Are there Personal Guarantees?

Are Agreements Assignable?

Effect on Quality of Earnings?



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## Due Diligence

### Regulatory Issues

- Governmental/CMS Required Approvals (CHOW, State AG/Court, State Licenses)
- Anti-Trust (HSR Threshold for 2025 is \$126.4 Million)  
Fee from \$30k to \$2,390,000
- Tax-Exemption
- Fraud & Abuse Issues -- Existing Relationships
  - Space Leases – expired, unsigned, undated, etc.
  - Physician Employment Agreements
  - Other Relationships with Physicians – medical director arrangements, unwritten financial relationships, joint ventures
  - Relationships with other referral sources

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## Due Diligence

### Regulatory Issues

- What do you do if you identify a potential problem?
  - Indemnification provisions – may not be practical depending upon parties involved or structure of transaction.
  - Self-disclose prior to closing – close over or await resolution?

Reps and Warranties **NOT** a substitute for due diligence

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## Typical Key Contract Provisions

Identification of what is being sold

Purchase Price

- Deposits
- Adjustments
- Earn outs
- Working capital adjustments
- Inventory adjustments
- Holdbacks/Escrow
- Bulk Sale



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## Typical Key Contract Provisions

Payment Terms

Representations and Warranties

- Compliance with Laws
  - Change in law/jeopardy

Indemnification

- Caps/baskets/buckets
- Time limits



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## Typical Key Contract Provisions

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### Labor

- Retention of key employees; layoffs/severance; COBRA obligations, WARN Act, union contracts

### Third Party Consents

### Restrictive Covenants

### Closing Conditions

### Transition Needs

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## Hidden Risks of Boilerplate Provisions

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### Say what you mean, mean what you say!

- Assignment vs. Third Party Rights
- Assets and Liabilities (they should be up front!)
- Survival of Representations and Warranties
- Arbitration (procedural impact)
- Amendment

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## Hidden Risks of Boilerplate Provisions

- Choice of Law
- Forum
- Waiver
- Notice
- Entire Agreement (are you sure?)
  - Multiple agreements and unintended consequences (*i.e.*, restrictive covenants)
- Third Party Rights



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## Controlling the Process and Managing Expectations

- Deal Team Coordination
- Organization is critical
  - lots of moving parts
- How much can you do in-house while still managing the business?
- Consider outside consultants



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## Controlling the Process and Managing Expectations

- Identify long-lead items
- Assign and track tasks and responsibilities
- Schedule regular team meetings for status updates
- Monitor milestone completions



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## Controlling the Process and Managing Expectations

### Identify the Deal Team

#### In House:

- Board Committee
- Legal
- HR
- Physician Leadership
- IT
- Compliance
- Government Relations/PR

#### Outside Counsel:

- Regulatory
- Tax
- Public Finance/Bond
- Labor & Employment
- ERISA
- Real Estate
- Environmental
- Anti-trust
- IP

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## Post-Closing Transaction Issues

### Transitional Issues

- Wind down of seller (purchased services)
- IT integration
- Protocols and standardization

### Post-Closing Covenants

- Capital commitments
- Continuation of services
- Charity care
- Restrictive covenants

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## Post-Closing Transaction Issues

### Enforcement of Commitments

- Foundation/Successor Entity
- Board/Board Committee
- Attorneys General
- Escrow Funds



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## OVERVIEW OF THE DEAL PROCESS: *A ROADMAP THROUGH THE PAPER JUNGLE*

# Questions?



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