

Hospital and Healthcare Industry TRANSACTION TOOLKIT

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Hospital and Healthcare Industry
Mergers & Acquisitions

Transaction Toolkit

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Principal Board Obligations

1. **Duty of Loyalty:** The obligation to act in good faith and with disinterest, and in the best interests of the corporation and, as applicable, its charitable mission (not in the director's own personal interests or in the interest of any other organization to which the director may owe a fiduciary duty).
2. **Duty of Care:** The obligation to act in an informed, good faith manner when participating in board decisions and exercising oversight over management and operations, with the care of an "ordinarily prudent person in a like position under similar circumstances." The concept of "under similar circumstances" refers to the specific circumstances facing the corporation at a particular time the board is expected to exercise its oversight (i.e. the more significant the circumstances, the greater the degree of care that is expected to be exercised).
3. **Duty of Obedience:** If a company is tax-exempt, a corollary to the Duty of Loyalty is the Duty of Obedience to Charitable Mission, which obligates directors by their actions to further the charitable purpose of the organization. In the change of control scenario, this obligates the board to evaluate individual proposals from the perspective of whether they will further the charitable goals and objectives of the organization.

FUNDAMENTAL CONSIDERATION: There should be complete transparency and clearly articulated expectations regarding the pro-competitive rationale and benefits for the transaction. If the company is tax-exempt, the board also should clearly articulate the manner in which the proposed transaction will further the charitable mission of the organization.

Potential Transactions Pitfalls; What Can Go Wrong

Experience suggests that the timely and efficient closing of a proposed change of control transaction can be threatened by the following types of events, among others:

1. **No Meeting of the Minds.** The parties proceed to negotiate and document a transaction without a clear, bilateral understanding at the earliest possible stage of the following:
 - a. Structure of the transaction
 - b. The realistic transaction timetable
 - c. Post-closing governance structures, as applicable
 - d. Financial terms and conditions
 - e. Impact on medical staff and employees
 - f. Impact on community and access to care
 - g. How the organization's charitable mission, as applicable, will be furthered
- Note:** In many cases, the parties only have agreement at the highest/most superficial level of transaction detail, without any meaningful discussion or agreement on critical substantive terms. In such situations, definitive agreement negotiations “drag on” and the transaction timetable is pressured when the parties are required to address substantive transaction issues not considered when the initial letter of intent or basic agreement was reached.
2. **Regulatory Review.** The transaction is subject to lengthy and expensive review and/or challenge under existing state corporate and/or health planning (e.g. licensure and C.O.N.) laws or from state or federal antitrust authorities.
3. **Lack of Permanency.** The terms and conditions allow one or both of the parties to disengage from the relationship and/or dissolve the organizational structure based upon occurrences or events which are neither extraordinary nor unforeseeable.
4. **Due Diligence Issues.** The due diligence investigation conducted by one of the transaction parties prior to execution of the documents identifies significant regulatory, legal or economic risks which that party is unwilling to assume or be associated with absent a material adjustment to the terms and conditions.
5. **Financial Feasibility.** Events subsequent to the execution of the letter of intent or other preliminary agreement substantially and negatively impact the financial feasibility model for the proposed transaction.

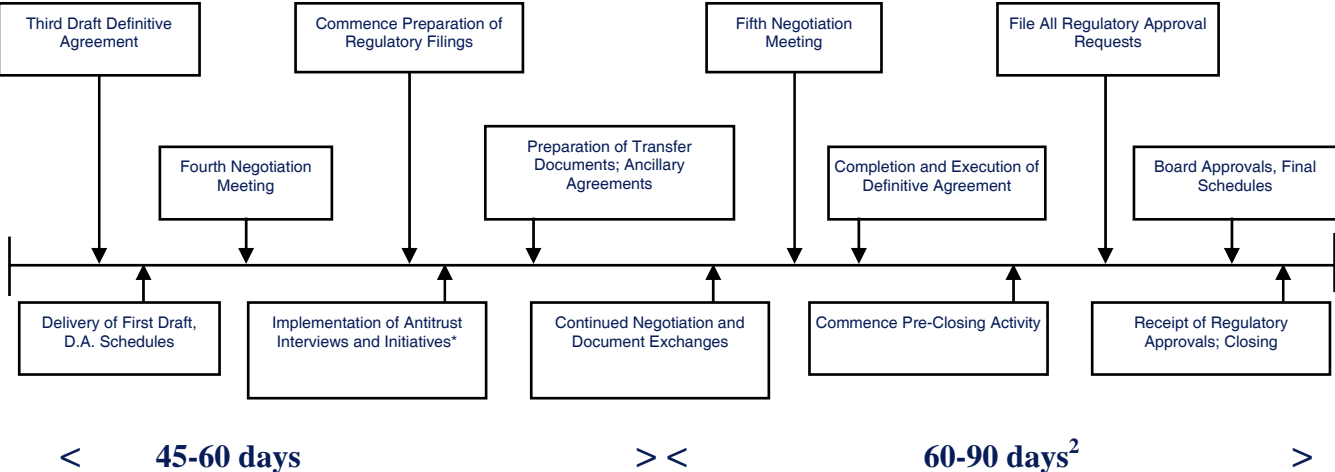
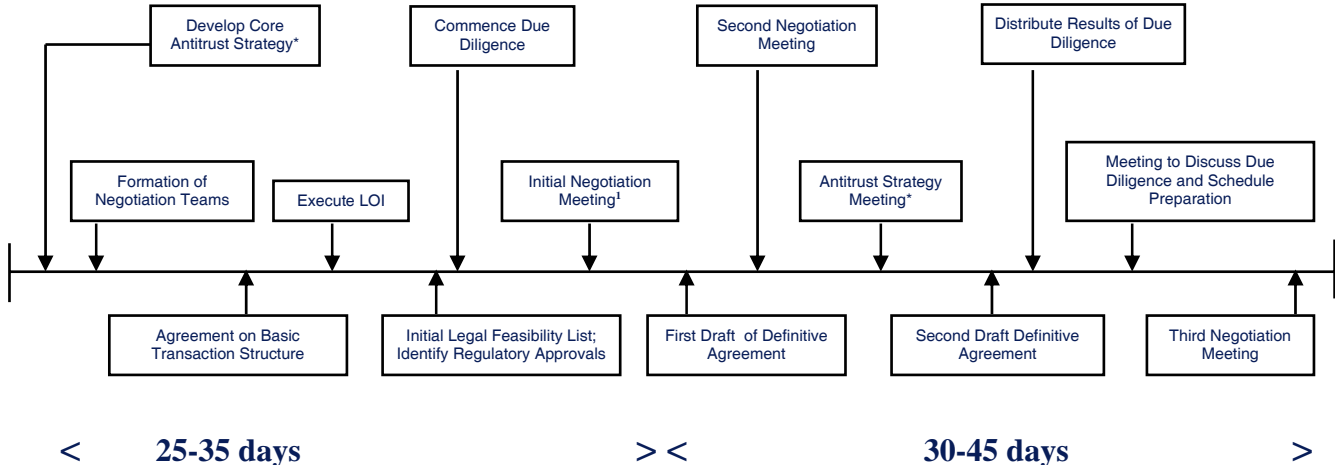
ANTITRUST GUIDELINES FOR THE CREATION OF DOCUMENTS

WORDS, PHRASES AND CONDUCT TO AVOID	REASON TO AVOID
GUILTY WORDS "Destroy after reading," "no copies," "for your eyes only"	Casts suspicion on the activity
POWER WORDS "Control," "dominate," "dominance," "dominant position"	Suggests abuse of power
NEGOTIATING POWER "Increased bargaining power," "dominant position," "leverage"	Suggests power to increase profits
PHRASES SUGGESTING NO REALISTIC COMPETITORS "Only seller," "essential seller"	Suggests no choice and power to raise prices
WORDS OF DESTRUCTION "Eliminate," "destroy," "obliterate," "annihilate"	Suggests an intent to destroy or injure
WORDS DEFINING MARKETS OR MARKET SHARE "75% of the [Product X] market"	Probably too narrow a market from an antitrust perspective
WORDS SUGGESTING AGREEMENT RATHER THAN COMPETITION "Collaborate," "collaboration," "gentleman's agreement," "partnering"	May imply an unlawful conspiracy
WORDS SUGGESTING ELIMINATION OR END OF COMPETITION OR CHOICE "Eliminate the competition," "no choice but to buy..."	Implies an unreasonable restraint or anticompetitive effect
WORDS OF EXCLUSION OR BOYCOTT "Exclude," "avoid," "boycott," "united front"	Suggests anticompetitive intent or effect
WORDS SUGGESTING POWER TO RAISE PRICES "Enhance the bottom line," "increase profits," "leverage"	Suggests intent to raise prices

TIPS ON HSR AND OTHER MERGER STRATEGIES

<p>ANTITRUST AND HSR ANALYSIS</p>	<p style="text-align: center;">DOs</p> <ul style="list-style-type: none"> ▪ Conduct an antitrust “reality check” upfront. (If this is a merger of primary competitors or firms with large market shares, the antitrust work should begin NOW.) ▪ Determine whether HSR or other filings are required. 	<p style="text-align: center;">DON'Ts</p> <ul style="list-style-type: none"> ▪ Don't wait until the last minute to do the antitrust analysis or to hire an economist, if appropriate.
<p>ITEM 4(c) DOCUMENTS</p> <p>“all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.”</p>	<p style="text-align: center;">DOs</p> <ul style="list-style-type: none"> ▪ Make all personnel aware of the Item 4(c) requirement. (Writings of non-officers, including consultants and advisors, that are shared with officers or directors become Item 4(c) documents.) ▪ Remember Item 4(c) documents are the first documents the agencies will review to understand and evaluate the transaction. ▪ Use Item 4(c) documents effectively to present the benefits of the transaction by emphasizing procompetitive aspects of the transaction. ▪ Address “drafts” to legal counsel prior to finalizing them. (This preserves the attorney-client privilege and allows counsel the opportunity to review them for misleading statements.) ▪ If a seller, review the Confidential Offering Memorandum’s section on Markets and Competition before it is finalized and distributed. ▪ Know how your own ordinary course corporate documents (10-K, Annual Report to Shareholders, Strategic Plans, Marketing Materials) define your markets and competitors. 	<p style="text-align: center;">DON'Ts</p> <ul style="list-style-type: none"> ▪ Don't leave the search for Item 4(c) documents to secretaries or others who are unfamiliar with the nuances of this requirement. ▪ Avoid creating unnecessary Item 4(c) documents, particularly e-mails. ▪ Avoid discussions of “markets” or “segments” in your writings generally, if possible, and avoid defining markets narrowly. ▪ Avoid discussions of future price increases or references to power over price. ▪ Avoid words such as “dominate,” “control,” “eliminate competition” (and the like) and avoid overstating market power. ▪ Avoid phrases or recommendations that can be misinterpreted or signify anticompetitive intent. ▪ (For further guidance, see the other side of this guide.)
<p>ATTORNEY-CLIENT PRIVILEGE</p>	<p style="text-align: center;">DOs</p> <ul style="list-style-type: none"> ▪ Retain experts and consultants through your outside legal counsel and have all reports addressed to counsel to preserve a claim of attorney-client privilege. ▪ Maintain existing attorney-client privilege by selective disclosure within your company. ▪ Develop a joint defense agreement, if multiple counsel are involved. 	<p style="text-align: center;">DON'Ts</p> <ul style="list-style-type: none"> ▪ Avoid including or paraphrasing legal advice in Item 4(c) documents, or claim a privilege with respect to any legal advice. ▪ Don't waive the attorney-client privilege by distributing privileged documents too widely.
<p>COMPLETE SEARCH FOR ITEM 4(c) DOCUMENTS</p>	<p style="text-align: center;">DOs</p> <ul style="list-style-type: none"> ▪ Conduct a complete search for and review of Item 4(c) documents, utilizing your counsel's expertise. ▪ (Failure to comply fully can have dire consequences – delay in the waiting period or large monetary penalties.) 	<p style="text-align: center;">DON'Ts</p> <ul style="list-style-type: none"> ▪ Don't minimize the importance of complying with Item 4(c). ▪ Don't underestimate the time it will take to search for and review Item 4(c) documents.
<p>“GUN JUMPING” AND ANTICOMPETITIVE AGREEMENTS</p>	<p style="text-align: center;">DOs</p> <ul style="list-style-type: none"> ▪ Develop and follow antitrust protocols to avoid “gun jumping” and other illegal conduct and to address the sharing of competitively sensitive information. 	<p style="text-align: center;">DON'Ts</p> <ul style="list-style-type: none"> ▪ Don't “jump the gun” on closing. ▪ Avoid anticompetitive agreements and the unnecessary sharing of competitively sensitive information.

Typical Transaction Timing



1. Internal team meetings precede joint negotiation meetings
2. Subject to regulatory review process

* As applicable

Fiduciary Duty Checklist Change-of-control (Transferor)

✓	Specific Duty
	1. Organization-Related
	<ul style="list-style-type: none"> • Application of Conflicts of Interest Policy to Process
	<ul style="list-style-type: none"> • Application of Confidentiality Policy to Process
	<ul style="list-style-type: none"> • Involvement of General Counsel in the Process
	<ul style="list-style-type: none"> • Establishment of Process for Exercising Oversight (e.g., a Special Committee)
	2. Background-Related
	<ul style="list-style-type: none"> • Appreciation of Challenges Prompting Change of Control
	<ul style="list-style-type: none"> • Extent to Which Alternatives have been Considered
	<ul style="list-style-type: none"> • Consistency with Charitable Mission, as applicable
	<ul style="list-style-type: none"> • Process for Exercising Oversight (e.g., a Special Committee)
	3. Process-Related
	<ul style="list-style-type: none"> • Consideration of Legal Feasibility Issues
	<ul style="list-style-type: none"> • Manner of Approach to Market
	<ul style="list-style-type: none"> • Criteria for Considering Offers
	<ul style="list-style-type: none"> • Engagement of Advisors
	4. Consideration of Specific Offers
	<ul style="list-style-type: none"> • Committee v. Full Board Review
	<ul style="list-style-type: none"> • Application of Transaction Criteria
	<ul style="list-style-type: none"> • Appropriate Level of Diligence
	<ul style="list-style-type: none"> • Involvement of Advisors, Executives
	<ul style="list-style-type: none"> • Special Not-For-Profit and For-Profit Considerations
	<ul style="list-style-type: none"> • Written Record
	5. Negotiation of Transaction
	<ul style="list-style-type: none"> • Awareness of Specific Terms and Conditions
	<ul style="list-style-type: none"> • Evaluation of Advantages/Disadvantages
	<ul style="list-style-type: none"> • Consideration of Specific Risks, Rewards
	<ul style="list-style-type: none"> • Effective Communication with Negotiation Team
	<ul style="list-style-type: none"> • Full Board Approval

**Fiduciary Duty Checklist
Change-of-control (Transferee)**

✓	Specific Duty
	1. Organization-Related
	• Application of Conflicts of Interest Policy to Process
	• Application of Confidentiality Policy to Process
	• Involvement of General Counsel in the Process
	• Establishment of Process for Exercising Oversight (e.g., a Special Committee)
	2. Background-Related
	• Appreciation of Factors Prompting Interest
	• Extent to Which Alternatives have been Considered
	• Consistency with Charitable Mission, as applicable
	3. Process-Related
	• Consideration of Legal Feasibility Issues
	• Selection of Specific Target
	• Manner of Approaching Target
	• Engagement of Advisors
	4. Development of Specific Offer
	• Form of Transaction
	• Basic Terms/Conditions/Financial Feasibility
	• Involvement of Advisors, Executives
	• Appropriate Level of Diligence
	• Analysis of Liability Allocation and Recourse Issues
	• Special Fair Market Value Consideration
	• Board/Committee Authorization
	• Written Record
	5. Negotiation of Transition
	• Awareness of Specific Terms and Conditions
	• Evaluation of Advantages/Disadvantages
	• Consideration of Due Diligence Report
	• Effective Communication with Negotiation Team
	• Full Board Approval