

# Merger and Acquisition: Compliance Due Diligence

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Faegre Drinker Biddle & Reath LLP

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## Introductions

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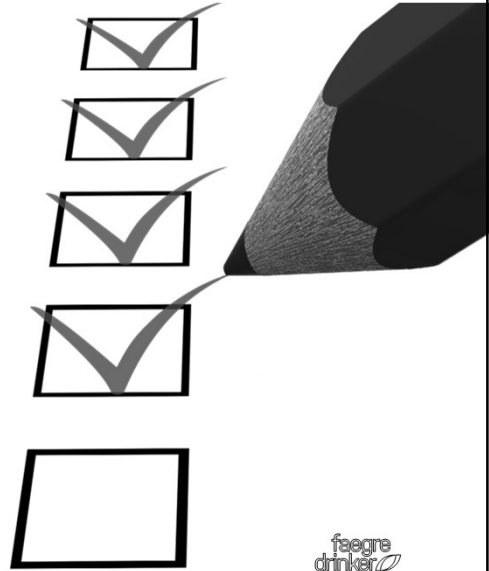


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## Outline

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- **Due Diligence**
  - Purpose
  - Categories
  - Scope
  - Process
  - Impact
- **Compliance Due Diligence**
  - Applicability
  - Large Companies
  - Small Companies- Minimum Experience



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# Due Diligence

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## Purpose

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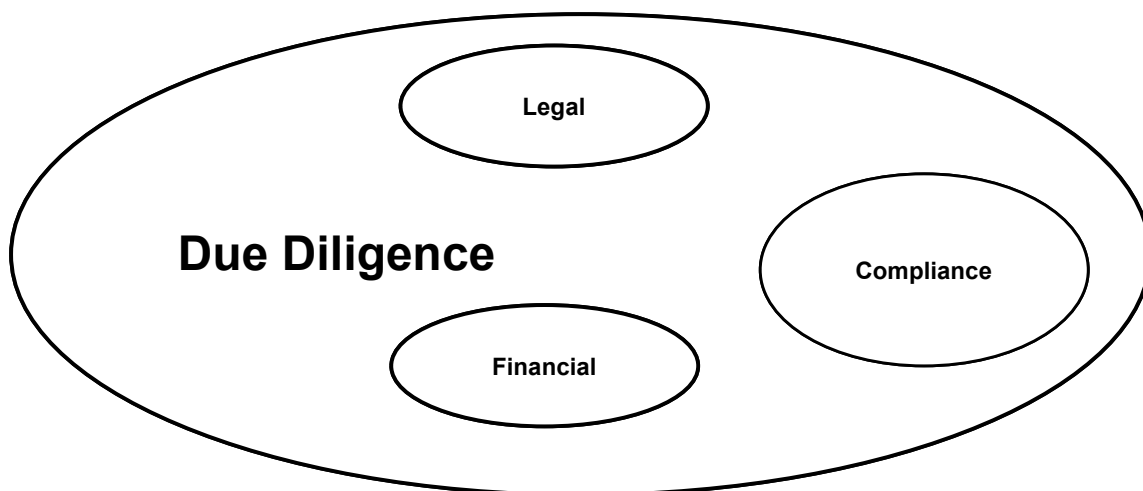
“A well-designed compliance program should include comprehensive due diligence of any acquisition targets. Pre-M&A due diligence enables the acquiring company to evaluate more accurately each target’s value and negotiate for the costs of any corruption or misconduct to be borne by the target. Flawed or incomplete due diligence can allow misconduct to continue at the target company, causing resulting harm to a business’s profitability and reputation and risking civil and criminal liability.”

**DOJ Guidance (2019)**

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## Due Diligence Categories

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## Legal Due Diligence Topics in Health Care Industry Transactions

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- Corporate and Financial Matters
- Services and Professionals
- Contracts
- Employees
- Employee Benefits
- Licenses and Permits
- Litigation and Regulatory Compliance
- Property, Equipment and Inventory
- Insurance
- Environmental
- Reimbursement
- Tax Matters

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## Scope

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- Tailor scope of inquiries to the size, complexity and type of target
- Not a one size fits all process
- Consider existing relationships between the buyer and the target
- Be thorough, but reasonable



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## Process

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- Make a list and check it twice!
- Establish the flow of information and stick to it!
  - No ex parte requests or disclosures
  - Choose a platform with the required functionality
  - Determine and manage access rights
  - Process for screening documents prior to production
  - Designate one or more people to be responsible for producing documents and managing disclosures
- Update request list to document disclosures



## Process

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- Build a team and assign responsibilities
  - Disclosing party – consult with an rely on functional area experts to identify responsive information
  - Reviewing party – identify subject matter experts to review various categories of information
- Develop processes for submitting and responding to follow up questions and requests
- Strategies for disclosing and evaluating problems
- Protecting competitively sensitive information
- Management interviews



## Process

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- Disclosing parties – tie disclosures to specific requests
- Reviewing parties – document findings and create records of materials reviewed
  - Summarize key terms of contracts
    - Parties
    - Term
    - Termination rights
    - Confidentiality
    - Restrictive covenants
    - Assignment and change of control provisions
    - Comments on technical deficiencies and regulatory issues
- Flag follow up items that will be needed for closing as well as post-closing notice requirements
  - Consents to assignment
  - CHOW filings for licenses and permits
  - Other regulatory notices



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## Process

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- Due diligence memo
  - The main deliverable following the conclusion of the reviewing parties due diligence review
    - Determine whether a memo will be produced as early as possible
    - Establish expectations on level of detail to include
  - Typical approach is to focus on significant issues and to provide assessment of legal and financial risks.
  - Distilling information from hundreds and thousands of documents into a final summary can be daunting – take good notes and flag issues that may warrant discussion in a final memo along with way.
  - Not a one person job – rely on functional experts
  - Provide samples when available

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## Process

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- Preparing for a sale
  - Provides opportunity to identify and address issues before disclosing
  - Establish data room before engaging with buyers
  - Proactive versus responsive approach
  - Dictate pace of process



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## Impact

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- How do due diligence findings impact the transaction?
  - Require sellers to address issues before closing
  - Survival period of representations and warranties
  - Purchase price holdbacks/Escrow arrangements
  - Indemnity carve outs
  - Renegotiation of economic terms
  - Diligence related closing contingencies
  - Representation and warranty insurance
  - Reconsideration of interest



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# Compliance Due Diligence

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## Scope

- Assess Risk Related to Compliance Program Issues
  - Billing compliance
  - Fraud and Abuse Issues (Stark, Antikickback)
  - Interactions with Healthcare Professionals
  - HIPAA Privacy and Security
- Advice: Included these in broader due diligence review
- Compliance Due Diligence = Is the compliance program effective?



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## Legally Required?

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- 2010 – Affordable Care Act
  - Compliance programs mandatory for entities submitting claims to Medicare and Medicaid
- If not legally required, community standard
  - Banks expect you to operate an effective compliance program
  - The lack of an effective compliance program can impact the availability of representation and warranty insurance in M&A transactions



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## Size

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- Department of Justice Federal Sentencing Guidelines
  - The formality and scope of actions that an organization shall take to meet the requirements of this guideline, including the necessary features of the organization's standards and procedures, depend on the size of the organization.



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## Assessment Resources

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- Part C and Part D Compliance Program Effectiveness Self-Assessment Questionnaire (2015)
- Measuring Compliance Program Effectiveness: A Resource Guide (2017)
- Evaluation of Corporate Compliance Programs
  - DOJ Guidance – April of 2019

### Measuring Compliance Program Effectiveness: A Resource Guide

ISSUE DATE: MARCH 21, 2017

HCCA-OIG Compliance Effectiveness Roundtable Roundtable Meeting: January 17, 2017 | Washington, DC



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## DOJ Guidance

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- Is the Corporation's Compliance Program Well Designed?
  - Risk Assessment
  - Policies and Procedures
  - Training and Communications
  - Hotline
  - Third Party Management
  - Mergers and Acquisitions



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## DOJ Guidance

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- Is the Corporation's Compliance Program Being Implemented Earnestly and in Good Faith (i.e. Effectively)?
  - Commitment by Senior and Middle Management (Tone at the Top)
    - Shared commitment and oversight
  - Autonomy and Resources
  - Incentives and Disciplinary Measures



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## DOJ Guidance

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- Does the Corporation's Compliance Program Work in Practice?
  - Continuous Improvement, Periodic Testing, and Review
  - Investigation of Misconduct
  - Analysis and Remediation of Any Underlying Misconduct



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## Risk Assessment

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- Enterprise Risk Management
- Compliance Risk Assessment
  - Documented Annual Process
  - Key Stakeholders
  - Deliverables: Scope/ Mitigation Plans
- Minimum:
  - Any evidence that you've considered and mitigated risks?



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## Policies

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- Policies address risk issues?
- Process for adopting policies
- Comprehensiveness
- Accessible
  - How quickly did they produce them?
- Minimum
  - Code of Conduct



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## Training and Education

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- Annual Education Plan
- Onboarding Process
- Annual Training for All Employees
- Specific/ Risk-Based Training
- Format for delivery and tracking
  
- Minimum
  - Newsletters, Staff Meetings



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## Communication

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- Compliance Hotline
  - Anonymous reporting mechanism
  - Efforts to publicize the hotline
  - # of calls and timeliness of response
- Minimum
  - Open door policy



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## Third Party Management

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- Extension of Compliance Program to Subcontractors
  - Mandatory for Medicare Advantage Organizations (FDR's)
  - Important for overseas business – FCPA
  - Due Diligence/monitoring/auditing/reporting
- Minimum
  - Written agreement

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## Due Diligence

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- Focus is on the target company – their acquisitions and mergers
  - Who conducted the due diligence? Thorough process?
  - Was the compliance department involved in the evaluation?
  - Was potential misconduct tracked and remediated?
  - How were compliance policies integrated post acquisition?
- Start ups – likely inapplicable



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## Ethical Culture

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“It is important for a company to create and foster a culture of ethics and compliance with the law”

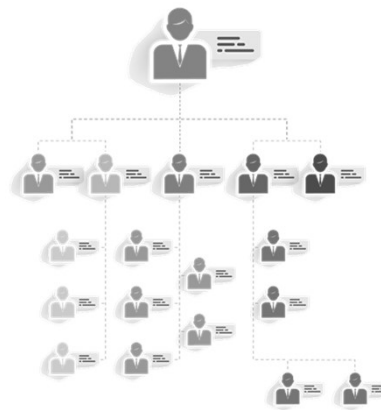
- How has senior leadership responded to issues of potential misconduct, or potential compliance risk?
- Any evidence of transparency with the government?
- Small companies: legal spend appropriate?



## Structure

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- Board Oversight – committee charter, report from Compliance Officer
- Senior Leader Oversight/ Compliance Committee – minutes
- Compliance Officer
- Compliance Department
- Minimum:
  - Identify a compliance officer



## Autonomy and Resources

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- Access to the Board? Board consent for hiring/ firing?
- Stand alone or dual hatted compliance officer?
- Reporting to the CEO?
- Resources – HCCA Benchmarking Survey
  
- Minimum: Are functions being performed?



## Auditing and Monitoring

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- Annual Audit Plan
- Track audits and monitoring activities
  - Internal and external
  - Report to senior leaders and the Board
  
- Minimum:
  - Self-assessment/ risk assessment
  - External audit of risks





## Response and Prevention

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- Timeliness of resolution
- Corrective Action Plans
  - Developed, implemented, and tracked
- Disciplinary Action – applied consistently
  
- Minimum:
  - Investigate allegations and take action



## Questions?

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# Thank you

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