

REAL ESTATE ISSUES IN HEALTH CARE M&A: THE TOP 3 PAIN POINTS AND HOW TO AVOID THEM

Mergers and acquisitions in the health care industry involve unique challenges that are not often present when undertaking similar transactions in other industries. Because of health care's highly regulated nature, parties may falter if a health care transaction is not reviewed and negotiated carefully with respect to the distinct concerns that health care entails. This article discusses certain key considerations related to real estate that parties to a health care M&A deal should keep in mind as they contemplate and negotiate a transaction.

Almost all health care mergers and acquisitions involve a real estate component, and in many cases, real property may be the most significant asset conveyed to the purchaser. Yet despite its value, real estate is frequently not at the forefront of the parties' discussions and negotiations with respect to a transaction. Parties on both sides of a deal should be careful not to overlook the real estate component, as this can result in unintended delays or liabilities. Accordingly, each party should consider the following at the outset of a transaction:

1. **Determine the Importance of Real Estate in Light of the Overall Transaction.** If there is one decision that can make or break the success of the real estate component of a transaction, it is weighing the relative importance of real estate in relation to the broader transaction. In an asset purchase where real estate is the most valuable asset, additional attention to real estate issues during the due diligence phase will naturally be required. In a merger or membership substitution, real estate might be afforded less importance, but the acquirer will still want to know the status of title and the scope of the obligations and encumbrances it is stepping into. Determining the relative value of the real estate will help real estate counsel and deal counsel work together to determine the appropriate scope of due diligence and the kinds of provisions that will be preferred in the purchase agreement. While the real estate team may not need intimate knowledge of every aspect of the purchase agreement, providing adequate information about the deal's structure and size, as well as the relative bargaining power of the parties, helps the team discern which issues to quickly elevate to the attention of deal counsel and which issues can likely be ignored or reported in a more routine manner.
2. **Review Lease Arrangements for Regulatory Compliance.** Although any transaction involving real estate requires an assessment of real estate title, an ALTA survey and an environmental site assessment, in the health care context, leasing compliance issues can be an enormous source of unforeseen risk. A careful review of lease language surrounding referrals, measurement of space and calculation of fair market rent will give the acquiring party the tools and knowledge needed to proceed in an informed manner that best mitigates those risks. When it comes to regulatory due diligence on leases and other assets to be assigned or transferred to the purchaser, familiarity with the structure of the transaction and the legal and ownership structure of the parties will also be critical in determining whether Stark, Anti-Kickback or federal tax-exemption laws apply.
3. **Count the Costs in Time and Money.** Transfers of real estate can be fraught with taxes and fees, particularly if the purchaser will be financing all or a portion of the purchase price. Environmental review, permitting, approvals and state and local governmental verifications can take time and delay closing. Early and open communication between real estate counsel and deal counsel can help determine the scope of necessary closing deliverables and set expectations as to timing and costs to avoid surprises.

Hall Render's health care real estate team has experience handling the real estate component of various transaction types in numerous states around the country. The real estate team prides itself on open and direct communication and has the capabilities and bandwidth to tackle complex deals in varying jurisdictions around the country. For more information on Hall Render's Real Estate services, click [here](#).

Throughout 2020, Hall Render's Mergers & Acquisitions Service Line will be publishing a series of articles identifying important, and often unique, aspects of health care transactions that should not be overlooked. Ranging from real estate to reimbursement, this series is designed to highlight key issues and considerations relating to niche components of health care transactions.

- Part 1: **Real Estate Issues in Health Care M&A**

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