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Health Care Transactions

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Good Deal: Reliable Guidance for Today's Health Care Transactions

*Prepared by: Heather Mallard and Greg Chabon with remarks by Stuart Stogner**

Abraham Lincoln famously stated, "A house divided cannot stand." This profound political insight likewise holds true in the vitally important world of today's health care transactions. Successful health care transactions require a combination of both regulatory *and* transactional proficiency. The Womble Carlyle Health Care Transactions Team was created out of our concern to provide our health care clients the security that only comes when regulatory and transactional skill work together in a unified and complementary manner.

The **FOCUS** section of this newsletter addresses the need to see your way clear through the complexity of health care transactions. By addressing a broad spectrum of various topics pertinent to health care transactions, this section will give you a clearer and more complete view of the context in which your health care deals take place. Then, the other section, **FOUNDATIONS**, will discuss the nuts and bolts of how to put a successful transaction together. Each month's installment will explain a specific piece of the transaction puzzle, until eventually, you will possess a reliable compendium that provides the basic components of today's health care deal.

So, welcome to this first edition of GOOD DEAL. We trust that this publication will prove itself a valuable resource to help you keep your organization strong and secure.

Focus:

Health Care Transactions. A simple phrase that for many health care clients and law firms presents a perplexing combination of issues and laws: regulatory, corporate, antitrust, merger and acquisition, tax, "market" terms and conditions. How can or should a health care entity approach doing merger and acquisition transactions? For many, the answer has historically been to look to their regulatory counsel to handle the transactions, and this has been met with good and not-so-good results. Health care transactions present an interesting mix of traditional M&A "deal work" with an ever-evolving regulatory overlay. To obtain the best results, and avoid potentially devastating mistakes, a combination of highly developed skills in each area (transactional and health care) needs to be applied. The growing complexity of health care transactions makes it difficult, if not impossible, for either a traditional "deal" attorney or traditional "health care" attorney to effectively handle these

**Stuart Stogner is not licensed to practice law. His activities are directly supervised by memebers of the firm licensed to practice law.*

transactions alone. Neither can effectively or efficiently "dabble" in the other's area of emphasis. And health care clients' management teams are increasingly sophisticated in their understanding and structuring of transactions, and in their desire to obtain the best results on both fronts – regulatory and transactional.

With federal and state health care regulations being written, re-written, updated, modified often (sometimes multiple times in a year), it is critical to have a deep understanding of how these regulations affect the structure and execution of a health care transaction. At the same time, the value and complexity of health care transactions continues to grow – venture capital, LBO/MBO, joint ventures, and recapitalizations are becoming common terms in health care transactions. This requires the expertise of attorneys with a deep understanding of how transactions are structured, reviewed, negotiated, adapted, and closed, and what terms are "market," so that health care clients get the deal they are after and understand the deal they get. With ever increasing scrutiny of such deals from regulators, shareholders, and trustees, the rigor applied to the "deal" must match the rigor applied to the regulatory review.

That's why Womble Carlyle formed its Health Care Transactions Team. By integrating the proven skill of our M&A transactional attorneys with that of our health care regulatory attorneys, this team provides our clients the breadth of proficiency that is critical for them amid today's health care marketplace.

From memoranda of understanding and letters of intent (the topic of this inaugural newsletter), through due diligence (on both the buy side and sell side), to preparation and review of definitive agreements, to negotiations, to closing, our Health Care Transactions Team attorneys can bring the "best practices" of a long history of transactional experience to bear on health care transactions.

We hope you will find this newsletter useful in helping you better understand the legal landscape of health care transactions. Beginning with our next edition, future FOCUS columns will spotlight various legal issues that crop up in health care deals, presented in a way that complements that edition's Foundation's segment.

Foundation:

The ABCs of LOIs and MOUs

Transaction junkies have a veritable "alphabet soup" lexicon of acronyms for critical deal elements and documents (e.g., APA, SPA, EBITDA, LOI, MOU, etc.) In an attempt to demystify the world of "deals", we wanted to start at the beginning, with LOIs and MOUs, which stand for *letters of intent* and *memoranda of understanding*, respectively. When one party approaches another about buying, selling or combining all (or portions) of their businesses, some of the key terms — such as price, assumption of liabilities and treatment of employees — are usually roughed out before the lawyers are sent off to draft the so-called "definitive agreement". The latter may be an Asset Purchase Agreement (APA), Stock Purchase Agreement (SPA) or, more often in the non-profit, health care arena, an Affiliation or Merger Agreement. Verifying in writing a common understanding about the key business points before beginning the draft definitive agreement is especially important when the target is considering multiple offers.

In the general business and for-profit, health care sectors, LOIs are more common, and typically contain only the key economic terms (which are usually non-binding), and some binding commitments about such matters as exclusive negotiations, treatment of confidential information and the payment of each party's expenses. It is always a better practice to indicate which portions of the letter are binding and what parts are merely preliminary in nature. When both parties are non-profits and some on-going relationship is contemplated, the MOU format is frequently used and often will go into considerable detail about matters such as governance, maintenance and expansion of services, capital commitments and physician development. Like an LOI, an MOU should have the binding and non-binding provisions clearly delineated. MOUs are typically longer because they essentially contemplate two separate deals— one, the immediate transfer of certain assets and liabilities, and the other, the future operation of the target within the "acquiring" system or enterprise.

One matter that in our experience often proves to be ill-considered is a decision to wait to involve the lawyers until the LOI/MOU is signed. Proponents of this approach cite the attendant (initial) time and cost savings and take comfort from the fact that most commitments in the LOI/MOU are non-binding. Because the LOI/MOU is intended to be the template for the definitive agreement to come, it is critical to understand how the deal pieces fit together and what each party is really saying. When parties are not pressed to articulate their positions in the same manner that would be reflected in the definitive agreement, the LOI/MOU can camouflage key misunderstandings on critical issues. It is not unusual for a fundamental disconnect to surface when one party (usually the target) presses the other to turn the "intent" recited in the MOU to provide money or certain services into an "obligation" to do so. The LOI/MOU is like a love letter emailed during the courtship process — everything is put in the best light and all want to believe in the pure intentions of their future mate. When it comes time to draft the prenuptial, things may appear differently. The lawyers' involvement can help to flesh out these potential issues at the LOI/MOU stage as they are likely to press for language that is more contractual than aspirational. Regardless of whether the lawyers assume seats at the deal table at the outset, their involvement should increase as the transaction progresses into due diligence (both investigatory and confirmatory), and beyond to the transaction closing. Due diligence is the topic of our next installment — both how to conduct it, and how to get ready for it. Stay tuned!