Mergers and Acquisitions in Healthcare: Getting Your House in Order

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Sharon Heaton has advised on transactions totaling more than $12 billion in deal value. sbLiftOff serves the lower-midmarket with the highest level of professionalism, with a focus on GovCon businesses. Prior to founding sbLiftOff, Ms. Heaton served as General Counsel of the Senate Committee on Environment and Public Works and Senior Counsel on the Senate Committee on Banking, Housing and Urban Affairs. She was a co-founder of Welford Energy, an investment bank providing services to clean energy and low carbon companies. Previously, Heaton served as Deputy General Counsel of Columbia Energy Group, a Fortune 500 company. She holds a Juris Doctorate from the University of Chicago Law School and a B.A. magna cum laude in Political Science from Barnard College at Columbia University.

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About sbLiftOff

sbLiftOff is a trusted M&A advisor to founder-led businesses and government contracting companies throughout the U.S.

sbLiftOff has closed transactions in a wide variety of industries, including but not limited to information technology, biotechnology and facilities maintenance.

Our team of industry experts bring a diversified level of industry and deal experience to build metric-driven growth stories for our clients. With a focus on helping owners realize their enduring value, our team builds deep trust with both sellers and buyers. We seek transactions that mutually benefit all parties to the transaction. We are consistently recognized for our thoughtful and personalized approach to client engagements and long-standing relationships with buyers and other strategic investors. We do not rest until we get our clients the lift off they deserve.

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Kathryn advises companies of all sizes on general business concerns, mergers and acquisitions, venture capital investments, and commercial contracting matters. She regularly counsels companies on a wide range of legal issues, including entity formation and structure, corporate governance, executive compensation issues, commercial leasing, licensing agreements, and regulatory compliance. Kathryn also represents companies in the negotiation and implementation of institutional financing and commercial loan transactions with large institutional lenders. She serves as the Practice Group Chair for PilieroMazza's Business & Corporate Group and is a member of the firm's Healthcare and Cybersecurity & Data Privacy teams.

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About PilieroMazza

PilieroMazza—a business law firm—serves as a strategic partner to government contractors and commercial businesses from across the United States in numerous industries.

We deliver results for our clients by implementing legal and business solutions that take the client's best interests into consideration. Moreover, PilieroMazza's efficient operational structure and lean approach to staffing matters translate into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

PilieroMazza is privileged to represent clients in the following areas:

- Audits & Investigations
- Business & Corporate
- Business Succession Planning
- Corporate and Organizational Governance
- Cybersecurity & Data Privacy
- Debt Financing
- Employee Incentive and Bonus Plans
- False Claims Act
- Government Contracts
- Government Contract Claims & Appeals
- Intellectual Property & Technology Rights
- Labor & Employment
- Labor & Employment for Government Contractors
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Native American Law & Tribal Advocacy
- Private Equity & Venture Capital

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Agenda

1. Process for the Sale of Business
2. Deal Structure
3. Purchase Price Consideration
4. Due Diligence Matters
5. Effects of a Change in Ownership

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Process for Sale of Business

Phase
1

Preparation
Preparation
Preparation

1-4 months

Phase
3

Closing

3-4 months

Phase
2

Going to
Market

2-4 months

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Phase I: Building Your Construction Story for Sale

COMPILE & ANALYZE
Financials, customer base, contract samples, property and equipment, capital expenditures

UNDERSTAND
Level of customer concentration and intimacy, strengths and challenges facing a company

DEVELOP
Metric-based growth story; create "Confidential Information Memo"

CALCULATE
Projections using customer relationships, project backlog, and historical growth rate

ANALYZE
Synthesize and review all due diligence documents; surface any barriers to sale and resolve, if possible

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Phase II: Finding Your Buyers

PROPRIETARY DATABASE

MARKET OUTREACH

DEVELOP
potential buyers list; review with sellers; finalize list

RESPONSE
to potential buyers

DUE DILIGENCE
on interested buyers; offer due diligence on seller to interested buyers

SOLICIT
Letters of Intent (LOIs)

NEGOTIATE
LOIs

SELECT
Best buyer

Phase III: From LOI to Close

Negotiate detailed
COMMERICIAL, FINANCIAL, LEGAL ISSUES

Manage all confirmatory
DUE DILIGENCE

COORDINATE
Attorneys, advisors, lenders

CLOSE
Your deal

POST-TRANSITION
Oversees adjustments to working capital and any other true-up elements

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Deal Killers

- TIME → deal fatigue is real
- SURPRISES → for Buyer or Seller

Strong, effective Due Diligence before going to market can prevent Deal Killers from tanking your transaction

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Deal Structure

Corporate Practice of Medicine

- How is the target entity structured?
- Provision of "medical services"
- Professional corporations and professional limited liability companies

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Corporate Practice of Medicine

- Structuring the transaction around corporate practice of medicine prohibitions:
  - Captive PCs and PLLCs with management services agreements
  - Joint ventures
  - Collaborations with 501(c)(3) entities

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Purchase Price Consideration

Types of Consideration

- Cash at closing
- Rollover equity (depending on transaction structure, rollover equity to current medical provider owners may be necessary)
- Earn-outs
- Holdback and Escrow (good idea for indemnification for overpayments and other claims)

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Earn-Outs

- Earn-outs can help to bridge the valuation gap between buyers and sellers by permitting the buyer to pay a lower purchase price up front while allowing the seller to benefit from short-term growth post-closing
- In the health care context, structure is important to avoid potential liability under the Anti-Kickback Statute or the Stark Law.

Financing Arrangements

- The acquirer may require third party financing to fund the acquisition or, as part of the purchase price consideration, issue the seller a promissory note
  - Under the UCC, a "health-care-insurance receivable" is "an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health-care goods or services provided to be provided."
  - While it is separately defined, the UCC includes it as a subset of "Accounts"; however, rules generally applicable to account debtors on accounts do not apply to insurers obligated on health-care-insurance receivables.
  - Perfected via financing statement

Anti-Assignment Under Social Security Act

– "No payments which may be made to a provider under Medicare or Medicaid for any services furnished to an individual shall be made to any other person under an assignment." 42 U.S.C. 1395g(c).
  - These provisions require that payments be made to providers; can create issues related to perfecting a security interest in the cash once received and deposited in an account.
  - CMS will make payments directly to bank accounts provided that the provider has sole control of the account.
  - Note: Security interest still exists if granted by the buyer; however, there may be issues of perfection related to control of the account.

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Due Diligence Matters

Licensing Requirements

- State and federal licensing requirements
- Is the target and its providers in compliance with licensing requirements?
- How will the transaction affect the target's licensing?

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Coding and Billing Systems

- Coding and billing systems to identify and request payments from Medicare, Medicaid, insurance providers, and other third-party payors
- Are systems in place?
- Are they accurate and reliable?
- Have there been third party audits?
  - What have the audits revealed?
  - Are there consistent overpayments?

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HIPPA Compliance

- HIPPA imposes strict requirements on how a medical provider maintains, stores, and discloses protected health information (PHI)
- Does the target have internal systems in place?
- Are they compliant?
- Does the target have a HIPPA/HITECH Certification?
- Are appropriate business associate agreements in place?

Kickbacks

- Anti-Kickback Statute (AKS)
  - Prohibits transactions intended to induce or reward referrals for goods or services reimbursed under any federal healthcare program
- Stark Law
  - Prohibits physicians from referring patients to receive "designated health services" that are paid for by either Medicare or Medicaid from entities with which the physician has a financial relationship

Kickbacks

- Does the target have any current agreements that may violate AKS or the Stark Law?
- Does a safe harbor apply?
- Will the transaction itself create potential AKS or Stark Law issues?

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Federal COVID-19 Related Funding

- Paycheck Protection Program Loans
- Provider Relief Fund
- Were the target's certifications complete and accurate when made?
- Has the target used the funds in accordance with the applicable program?
- Is a PPP loan still outstanding? Will the provider seek forgiveness prior to the transaction?

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False Claims Act Compliance

- Reimbursement requests through the Medicare and Medicaid programs are subject to FCA liability.
- Failure to correct Medicare and Medicaid overpayments within 60 days can create FCA liability.
- May arise with respect to PPP loan and Provider Relief Fund certifications
- Liability can be substantial (i.e., treble damages)

Effects of a Change in Ownership

Changes in Ownership

- Update state and federal licenses
- Payor contracts may include anti-assignment provisions that are implicated by the transaction, depending upon the scope of the provision and the structure of the transaction

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Medicare CHOW

- Depending on the structure of the transaction, it may qualify as a change in ownership (CHOW) under the Medicare program.
- If the transaction qualifies as a CHOW, the current and new owners must submit a CMS Form 855A and other documentation for approval of the CHOW
- Even if the transaction does not qualify as a CHOW, the target must report a change in ownership as a change in the target's Medicare information with 90 days

CHOW Implications:
Acceptance of Provider Agreement

– The target/buyer can request approval of the CHOW, which will lead to automatic assignment of the provider agreement to the new owner
  - New owner will be subject to the terms and conditions of the provider agreement
  - New owner will be liable for sanctions/penalties under agreement
  - New owner will begin to receive payments once CMS approves the assignment

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CHOW Implications: Rejection of Provider Agreement

– Alternatively, the target/buyer can reject assignment of the provider agreement
  - New owner will not be liable for sanctions/penalties under agreement
  - New owner will have to apply for participation in the Medicare program; however, new owner cannot bill and receive reimbursements through the Medicare program for services until it is registered for the Medicare program.

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Questions?

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