

WEBINAR

Deal Dynamics: Addressing COVID-19 Issues in Health Care Services M&A

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Speakers



Jennifer Kurtis

PARTNER, CORPORATE, PRIVATE EQUITY
New York
+1 (212) 294-6675
jkurtis@winston.com



Ari Markenson

PARTNER, CO-CHAIR, HEALTH CARE & LIFE SCIENCES INDUSTRY GROUP
New York
+1 (212) 294-3545
amarkenson@winston.com

The Issues

- Paycheck Protection Program (PPP) Loans
- Provider Relief Funds/Grants from the HHS Public Health and Social Service Emergency Fund
- Medicare Advance/Accelerated Payments
- Regulatory Waivers and Executive Action

Paycheck Protection Program (PPP) Loans

Due Diligence

- Buyers should seek to confirm that the target has complied with requirements of PPP:
 - target completed proper affiliation analysis and problematic minority protective provisions were waived;
 - target used PPP funds only for permitted and forgivable purposes; and
 - certifications regarding necessity to support ongoing operations were reasonably made (including access to capital analysis).

Representations and Warranties

- Include representations on participation in PPP and other government relief programs
- Include representations regarding:
 - eligibility;
 - accuracy of application;
 - use of proceeds;
 - compliance with requirements for forgiveness; and
 - debarment of directors, officers or other employees from government contracting.
- Buyers should seek to treat these representations as fundamental given the six-year audit period.

Covenants

- Interim Operating Covenants
 - Should provide sellers flexibility to obtain forgiveness and take steps to comply with SBA requirements.
 - Financing cooperation covenants should ensure that provisions in acquisition financing documents do not cause any PPP issues.
- Post-Closing Covenants
 - If the PPP loan is to remain outstanding, sellers should seek covenants that buyer will actually seek forgiveness and will not take actions that could impair forgiveness.
 - Parties should consider who should control potential audits of PPP compliance given the six-year audit period.
 - A general cooperation covenant should also be included.

Change of Ownership Considerations

- The SBA has provided guidance taking the position that it is a violation if a change of ownership occurs within 12 months of a PPP loan.
- The PPP loan documents may provide that the failure to obtain lender consent to a change of ownership is an event of default, which could result in lack of forgiveness.
- SBA may require lender consent even in the absence of such a default provision.
- Lenders are required to obtain SBA approval for a change in ownership or risk losing the SBA guarantee.
- SBA approval is taking two to six weeks.
- SBA approval is not required if a holding company, rather than the borrower, is the entity undergoing a change in ownership.
- These matters are still in flux, and the SBA may issue additional guidance in the future clarifying its intent.

PPP Loan as Debt

- PPP loan is typically treated as debt unless forgiven.
- Sellers will take the position that they will rep to the accuracy of the PPP application, the borrower's eligibility for the program and the appropriate use of proceeds, and therefore buyer should only have recourse to the extent of a breach of those reps.
- Buyers will take the position that the full amount of the PPP loan should be escrowed from proceeds at closing and used to repay any portion of the PPP loan that is not forgiven.
- The parties will typically negotiate some middle ground, such as no escrow and seller only has liability for amounts unforgiven to the extent not caused by buyer post-closing.

Indemnification for PPP Loan

- Buyers could include a line-item indemnity for PPP loan reps generally or to the extent not forgiven. This could further be strengthened by a special escrow or larger indemnity escrow.
- Representation and warranty insurance will generally not be available for PPP representations.

Provider Relief Funds/Grants from HHS

Quick Background

- \$170 billion in grants as a result of two pieces of legislation.
- Money divided up into distribution buckets beginning with first two distributions totaling \$50 billion going mostly to providers in the Medicare program. Next \$15 billion allocated to Medicaid and CHIP providers.
- Acceptance and use of grant money subject to terms and conditions. Assuming provider meets those terms and conditions, no repayment obligations.

Diligence

- Did the provider receive money and/or apply for money in any of the distributions to date?
 - Did they return any monies?
- Did the provider attest to any of the terms and conditions relating to the acceptance or use of the money as of yet?
- How is the provider complying with the terms and conditions relating to acceptance and use of the funds?
 - “... to prevent, prepare for, and respond to coronavirus, domestically or internationally, for necessary expenses to reimburse, through grants or other mechanisms, eligible health care providers for health care related expenses or lost revenues that are attributable to coronavirus...”

Purchase Agreement

- If funds were received and used, but not entirely utilized –
 - Buyer should seek indemnification from sellers to the extent that the funds cannot be utilized and must be returned to the government
 - Buyer should control use of funds post-closing, but include covenants that it will seek to use the funds in accordance with HHS terms and conditions
- Reps –
 - Inclusion of representations and warranties specific to acceptance and use of funds
 - Including provisions specific to compliance with HHS terms and conditions
 - If funds were not received or received but returned, inclusion of reps and warranties that funds were not received, not utilized, returned, etc.

Other Issues and Post-Closing

- Other Issues
 - Want to be sure buyer has all necessary documentation in order to address any auditing/enforcement issues in the future
- Post-Closing
 - If funds are left-over from prior owner
 - Need to ensure appropriate compliance going forward
 - Don't want to deviate from how funds were used historically
 - Need to refund any funds that buyer is unable to utilize in accordance with terms and conditions

Medicare Advance/Accelerated Payments

Diligence

- Did the company request any advance/accelerated payments?
 - How much and when did they receive them, if any?
 - Have they repaid any of the advanced funds?
 - Has any recoupment started?

Purchase Agreement

- If funds were received and used, but not paid back –
 - Remaining amounts due to government should be deducted from purchase price.
- Reps –
 - If did not ask for advances, no real issue.
 - If asked for and received advances, inclusion of representations and warranties specific to acceptance and use of funds.

Post-Closing

- If the funds have not been repaid yet and there are still repayment/recoupment obligations, need to stay on top of process to ensure that it doesn't disrupt financial operations of buyer on a go-forward basis

Regulatory Waivers and Executive Action

Diligence

- What if any federal or state regulatory waivers, temporary legislative fixes or executive action has the Seller taken advantage of or is taking advantage of in its current operations?
- Assuming the Seller has utilized waivers –
 - How will that utilization affect the go-forward operations of the business?

Purchase Agreement and Post-Closing

- Purchase Agreement
 - Reps and Warranties on compliance with specific state and federal waivers
- Post-Closing
 - Buyer needs to understand how waivers have been integrated into operations
 - Buyer needs to pay attention to when waivers might sunset or if they become permanent.

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