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# Getting a Senior Housing Deal Done in the Era of COVID-19

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As the effects of the novel coronavirus ("COVID-19") continue to impact businesses across the United States, the mechanics for a successful acquisition or disposition of real estate assets and, in particular, long-term care facilities, are evolving. The parties to a transaction involving an assisted living or memory care facility need to consider the implications of COVID-19 on the real estate and healthcare components of such a transaction. This article outlines threshold points the parties should address when negotiating purchase agreements for such long-facilities.

## 1. Due Diligence

Prior to the COVID-19 pandemic, it was typical to see purchase agreements that contemplated a thirty or forty-five day diligence period. Now, parties need to consider a diligence period of more than forty-five days to account for closures, government delays, and restrictions on accessing the facilities. The parties should also account for the possibility of delays resulting from the implementation of recommendations issued to address the spread of, or exposure to, COVID-19. Buyers may consider negotiating longer diligence periods or unilateral rights to extend the diligence period or closing date upon the occurrence of COVID-19-related delays. Sellers may consider requiring non-refundable deposits as a condition to granting extensions of the diligence period or closing date.

Key to determining how long the diligence period should be is the length of time it is taking service providers to deliver typical third party reports. Many providers of diligence reports, such as title commitments, surveys, property condition reports, and environmental assessments, continue to operate on modified schedules. These time periods vary based on the service providers, the policies and procedures in place at the long-term care facility, and may also vary from state to state. As such, it is critical for the parties to discuss property access issues at the outset of the transaction.

From a healthcare regulatory standpoint, diligence can typically be done from a distance. As long as seller leadership (such as the privacy officer, chief of marketing, and compliance officer) and relevant documentation, such as licenses and certifications, marketing collateral, and facility surveys, are available, most healthcare regulatory diligence can be completed during the pandemic. Once healthcare regulatory diligence has commenced, it is important that COVID-19-specific questions be asked and answered. For example, buyers may inquire regarding the following:

- Steps seller has taken to manage and track compliance with recently enacted COVID-19 related laws, rules and regulations.
- The types of health data seller has been collecting from employees or non-employees in connection with COVID-19. How seller has been collecting the information, how it has been using or sharing this

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information and any notices or consents the seller provides to or obtains from its employees or from non-employees when collecting this information.

- Whether the seller has received CARES Act or state relief funds or loans (more on this below).

## II. Healthcare Regulatory Processes

Parties to a long-term care transaction in the era of COVID-19 might assume that regulatory agencies, such as state licensure agencies, are processing applications and responding to inquiries more slowly because of demands related to the pandemic. However, in our experience, many agencies are actually processing applications more quickly than pre-pandemic. For example, in a recent transaction involving a state licensing agency, processing time had moved from a couple of months pre-pandemic to two to three weeks during the pandemic. The agencies involved in processing these transactions are often the same agencies primarily responsible for the state's public health response to COVID-19, and are aware of the importance of helping parties to move applications forward more quickly. It is also possible that added focus from state leaders and anticipated scrutiny of actions post-pandemic have made these agencies more responsive.

While faster processing may be the case for some agencies, it may not be the case for all agencies. For example, the New York certificate of need office has not reviewed new certificate of need applications since March in light of the need to focus all attention on the response to COVID-19. Where agencies are either delayed in reviewing applications or are not reviewing applications at all, applicants should consider whether the state has issued any orders or waivers relevant to the transaction. For example, on March 20, 2020, Georgia Governor Brian Kemp issued an [executive order](#) (which has been renewed via Governor Kemp's continued renewal of the COVID-19 state of emergency declaration) which orders the following:

That the Department of Community Health is authorized and directed to implement the suspension of Code Section 31-2-7 [related to the Department of Community Health's ability to promulgate regulations] where such suspension would reduce the administrative burden on healthcare facilities and the State in responding to the Public Health Emergency presented by COVID-19.

That that the Department of Community Health is authorized and directed to implement the suspension of Code Section 31-6-40 [related to certificate of need] where such suspension would permit capable facilities to expand capacity, offer services, or make expenditures necessary to assist with the needs of this Public Health State of Emergency.

That the Commissioner of the Department of Community Health or his designees is authorized and directed to implement waivers of those rules and regulations necessary to prohibit the prevention, hindrance, or delay of necessary action to assist or aid in coping with the Public Health Emergency presented by COVID-19.

In our experience, citing COVID-19-related waivers has proved effective in moving regulatory processes forward.

A threshold issue for approval of CHOW applications (and in particular licensure applications) in many states is the requirement for a pre-CHOW facility inspection or survey. Such surveys contribute to the delay in

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closing of a transaction until the application reviewer can schedule a time to travel to the facility for a survey, which can sometimes take many weeks or even months. Because many states have restricted entrance to assisted living and memory care facilities and emphasized allowing individuals into these facilities only when absolutely necessary, CHOW inspections and surveys have been discontinued during the crisis in many states. Rather than delaying transactions, however, most states are waiving the requirement for a pre-CHOW survey. Note, however, that it is possible the agency may perform an in depth survey after the pandemic is over.

Regulatory processes such as state licensure and certificate of need, Medicare, and Medicaid if they are applicable to the overall transaction, may not be as prohibitive as transaction parties assume. A proposed deal may be able to move forward from a regulatory standpoint with a pace equal to or even faster than pre-pandemic. The analysis depends on the state and the proposed change, and parties should seek consultation early ensure a realistic plan is in place for transaction timing.

### III. Drafting Deal Documents

While the COVID-19 crisis has injected uncertainty into transactions, effectively drafting and negotiating deal documents, such as an asset or stock purchase agreement or operations transfer agreement, can help eliminate some of the uncertainty. Below, we review some high level sections of these agreements and how they can be modified to address concerns that buyers or sellers may have during the pandemic.

- **Representations & Warranties / Covenants**

Healthcare representations and warranties and covenants are a critical and heavily negotiated component of deal documents when circumstances are normal. However, there is added importance on carefully developing and negotiating representations and warranties related to COVID-19. The representations and warranties should contemplate not just current operations of a long-term care facility, but also ongoing operations between signing and closing of a transaction (assuming the transaction is not a sign and close). For example, a buyer may be more comfortable closing a transaction and a seller more able to reduce buyer anxiety by including the following seller representations and covenants:

- That seller is complying with state, local, and any applicable federal requirements related to COVID-19.
- That seller will continue to comply with COVID-19-related requirements.
- That seller will report resident or staff member COVID-19 diagnosis.
- Whether there have been or will be any furloughs or layoffs of staff due to COVID-19.

Of course, in this scenario, sellers should negotiate to limit their exposure to these additional representations and warranties with materiality and knowledge qualifiers.

- **COVID-19 Indemnity**

Given the potential for liability during and after the pandemic, some buyers may negotiate for a COVID-19-specific indemnity to be included into the deal documents. Though the liability would typically be captured already by language making clear that seller retains all pre-closing liability, COVID-19-specific language can provide greater

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certainty around the indemnity and give buyers added comfort in the transaction. The indemnity can be as simple as a statement that seller retains all liability for any pre-closing noncompliance with COVID-19-related actions or inactions required by applicable law or regulations.

- **Closing Conditions**

To account for ongoing uncertainty, Buyers may consider the following closing conditions: a right to terminate the purchase agreement if any governmental regulations enacted after the date the purchase agreement is executed are likely to have a material adverse impact on the operations of the facility (e.g., extended closure of the facility, reduced occupancy levels to promote physical distancing, etc.); a financing contingency; and a right to terminate the purchase agreement upon the occurrence of a material adverse change in the financial, operational, or economic conditions of the facility.

Sellers will need to determine how much flexibility they will allow in closing conditions in light of market conditions. If closing conditions unreasonably expose the seller, sellers should consider requiring additional non-refundable deposits to mitigate this risk.

## IV. Relief Fund Issues

As a part of the CARES Act, relief funds have been made available to long-term care providers across the country. Federal funds have been released to Medicare providers such as skilled nursing facilities and Medicaid funds have been made available to a wider range of providers, including Medicaid-enrolled assisted living facilities. With the funding comes certain obligations and, where a seller has accepted relief funds, the transaction documents and diligence should address the requirements to ensure seller has complied with and will continue to comply with its obligations. The issues include but are not limited to:

- Did the seller accept relief funds? If so, which funds?
- Has seller affirmatively accepted the funds through the Department of Health & Human Services Attestation portal?
- What Terms and Conditions apply to seller and have they been complied with?
- What documentation has seller maintained to confirm its COVID-19 related expenses and losses?
- Has seller submitted required tax documentation and revenue loss estimates in connection with such funds through the General Distribution Portal?
- Does seller expect to receive any additional relief funds? If so, will the purchaser be able to access these funds if they are distributed post-CHOW?
- Has there been any “double dipping” with relief funds and other loans from the federal government such as PPP loans or Medicare accelerated payments?
- How does the CHOW impact eligibility for future funds?

## V. State Grant Funds

In light of the significant costs long-term care providers are facing due to COVID-19, some states have made relief funding available in the form of grants, loans, special Medicaid payments, and funds that must be used for the purchase of COVID-19 supplies and equipment. For example, Montana Governor Steve Bullock announced that

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\$123 million in grant funds (funded through the CARES Act) would be made available to various families, small businesses, non-profits, health services centers, and individuals heavily impacted by COVID-19. Long-term care facilities are eligible for many of the state grants. North Carolina is an example of a state using Medicaid rate increases to inject funds into long-term care facilities. The state is providing hardship advances and retroactive targeted rate increases for long-term care facilities. Parties to a transaction will want to communicate regarding:

- What state funding was applied for because of the pandemic?
- What state funding was actually provided to seller?
- Are there any conditions tied to the state funding?
- Is the funding entity-specific (i.e., can the buyer receive the benefit of the funds)?

## VI. Transaction Financing

In an environment where lenders are tightening credit issuances and underwriting requirements, buyers may need to identify a lender earlier in the transaction timeline. Typically, most buyers wait until the diligence period is almost expired to engage a lender – a strategy used to avoid or reduce financing costs until there is a higher probability of closing. However, in this climate the parties to a transaction may need to engage a lender earlier in a transaction process to understand whether the lender is:

- Issuing new loan commitments for long-term care facilities;
- Requiring a higher loan to value ratio on new loans (“LTV”) and, in light of LTV changes, whether additional financing sources may be needed, such as mezzanine loans. This potential additional layer of financing will require an analysis of whether the senior lender will allow mezzanine debt and require the negotiation of an intercreditor agreement;
- Requiring extended health care representations or warranties or imposing longer closing timeframes; and
- Imposing new or increased reserves such as interest reserves, debt service coverage reserves, and the like, in anticipation of diminished revenue. These reserves are, in essence, additions to the borrower's capital stack, i.e., more cash is required to close.

Engaging a lender earlier in the process allows the parties to better position themselves for any additional or atypical requirements of a lender and leaves additional time for contingency plans if securing a lender is more difficult than anticipated.

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Stay tuned for more practical advice and refer to the [AGG Coronavirus Resource Center](#) for additional legal alerts. This alert is not intended to be comprehensive, nor does it constitute legal advice. Please reach out to an attorney if you require specific advice.

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