



STRATEGIC MANAGEMENT SERVICES

# BAKING COMPLIANCE INTO THE ACQUISITION/MERGER DUE DILIGENCE PROCESS

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## INGREDIENTS

- ✓ The due diligence team
- ✓ The compliance-related review
- ✓ Your findings
- ✓ Integrating the acquired/merged entity into your workplan



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## WILL THE CAKE RISE?



- ✓ Compliance is a member of the team.
- ✓ Compliance can assess the status of the entity.
- ✓ Compliance can advise leadership on any corrective actions needed before or after the acquisition.



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## OR WILL IT FALL?



- ✓ Compliance may have a lot of unplanned work.
- ✓ Corrective action may not take place quickly enough.
- ✓ Your organization may be at risk from several different directions.



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## WHERE IT BEGINS

- ❖ Your entity is interested in acquiring/merging with another entity.
- ❖ Time for the magnifying glass
  - ✓ Due diligence to assess the costs and risks of the transaction
  - Compliance can help to avoid a bad outcome



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## GETTING TO THE TABLE

- ❖ Where is compliance in your structure?
  - ✓ Part of leadership?
  - ✓ Part of another layer in the organization?
- ❖ Relationships – Who do you need to convince?
  - ✓ Who is in charge?
    - Who will be your champion?



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## WHY COMPLIANCE IN DUE DILIGENCE?

### ❖ DOJ's Position

- ✓ A well-designed compliance program should include comprehensive due diligence of any acquisition targets.
- ✓ How has the compliance function been integrated into the merger, acquisition and integration process?
- ✓ The extent to which a company subjects its acquisition targets to appropriate scrutiny is indicative of whether its compliance program is, as implemented, able to effectively enforce its internal controls and remediate misconduct at all levels of the organization.



DOJ Evaluation of Corporate Compliance Programs (Updated June 2020)

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## MORE FROM THE DOJ

- ✓ Prior misconduct committed by an acquired entity should receive less weight
  - If the acquired entity has been integrated into an effective, well-designed compliance program at the acquiring corporation,
  - If the acquiring corporation addressed the root cause of the prior misconduct, and
  - If there is full and timely remediation.

Lisa Monaco, Deputy Attorney General, September 2022



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## LEGAL IS DIFFERENT FROM COMPLIANCE



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## LEGAL IS DIFFERENT FROM COMPLIANCE

- ❖ **Legal due diligence will focus on adherence to the law**
  - ✓ Advise the acquiring organization of any potential legal offenses/risks
  
- ❖ **Is there legal evidence that the entity has committed offenses that the acquiring entity may need to cure?**
  - ✓ AKS/Stark violation
  - ✓ Other False Claims Act violations
  - ✓ Coding errors/overpayments
  - ✓ Conflicts of interest



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## COMPLIANCE IS DIFFERENT FROM LEGAL

- ❖ Compliance due diligence should focus on whether there are controls in place to reduce the likelihood of an offense
  - ✓ Are processes in place to easily detect offenses?
  - ✓ How are alleged/real offenses reported?
  - ✓ Are corrective actions made if an offense occurs?
    - What has been the average length of time to correct?

What is the compliance *culture*?



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## THIS IS NOT AN EFFECTIVENESS REVIEW

- ❖ The Big Picture:
  - ✓ Is the entity under a corporate integrity agreement?
  - ✓ Does the entity have a compliance program?
  - ✓ Does the entity THINK it has a compliance program?
  - ✓ Are there elements of a compliance program that have not been tied together?
  - ✓ Is there a Code of Conduct?
  - ✓ Is there a hotline?
  - ✓ What risks can you learn about?



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## BE MINDFUL OF THE STRESS

- ❖ Are you able to visit the entity?
  - ✓ Perhaps virtual meetings?
  
- ❖ How will you and the due diligence team be introduced?
  
- ❖ With whom will you be meeting?
  - ✓ Is there a compliance officer?
  - ✓ Unlikely that you'll have contact with many folks.



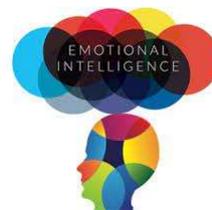
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## USE YOUR EQ

- ❖ Emotional Intelligence:
    - ✓ Understand the emotions, stress, concerns, folks in the entity may be feeling
    - ✓ Make them feel comfortable or you won't get any information
    - ✓ Confidentiality! You'd be surprised what you'll learn
- BUT**
- ✓ Recognize that folks may use you



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## WHAT ARE YOU LOOKING FOR?



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## WHAT'S THE TONE AT THE TOP?

- ❖ You want to know if the organization has any experience with Compliance.
  - ✓ Program?
  - ✓ Officer?
  - ✓ Investigations?
  
- ❖ Do they appear to support the concept of Compliance?



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## IS THERE A CULTURE OF COMPLIANCE?

- ❖ Do employees know if there is a compliance program?
- ❖ Do employees know who the compliance officer is?
- ❖ Do employees know if there is a hotline?
  - ✓ Do they use it?
  - ✓ Are they worried about retaliation?
- ❖ Is there compliance training at onboarding and annually?



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## GET A FEEL FOR THE CURRENT STATE

- ❖ It bears repeating:
  - ✓ You are not conducting a detailed effectiveness review
  - ✓ You are not conducting a true gap analysis
- ❖ Use the elements and known compliance risks for the organizational type as a guide to get a little more of the picture.



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## HOW WILL YOU GET THE INFORMATION?

- ❖ **List the points you want to cover**
  - ✓ Be careful how you use your list in front of others
  - ✓ Try to frame your questions as yes/no
  - ✓ Let them tell you more – give them space
- ❖ **Keep it conversational**
- ❖ **Schedule time after each meeting to jot down any thoughts, reflections, comments, etc.**



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## WHAT SHOULD YOU ASK?

- ❖ **Focus on the elements**
  - ✓ Do you have a compliance program?
  - ✓ Do you have a Code of Conduct?
  - ✓ Is Compliance/HIPAA training required at onboarding and annually?



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## WHAT SHOULD YOU ASK?

- ❖ Is there a hotline?
- ❖ Is there a regulatory risk assessment?
- ❖ Does someone check the exclusions databases?
- ❖ Does compliance collaborate with other leaders?



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## BOTTOM LINE



WHAT KEEPS YOU UP AT NIGHT?



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## DO YOU SEE RED FLAGS?

- ❖ Look at some of the business relationships from a compliance eye
- ❖ Gift-giving, other incentives
- ❖ Referrals - incoming/outgoing
- ❖ Co-payments/deductibles/other fees



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## WHAT'S CODING AND BILLING LIKE?

- ❖ Is an independent coding audit needed
- ❖ Ensure any overpayments are mitigated before the deal is finalized (if possible)
- ❖ Sets the stage for billing and coding education



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## DON'T FORGET ABOUT HIPAA

- ❖ Is there someone responsible for privacy/security?
- ❖ Waking around versus virtual
  - ✓ Can see a lot more if you're able to walk around
    - Notice of Privacy Practices
    - Computer Screens
    - Staff talk
- ❖ Has a security risk assessment been performed ... lately? EVER?
- ❖ Has there been a reportable breach?



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## WHILE THE CAKE IS IN THE OVEN

Review your notes – what's your basic assessment?

- Find the positives
- Previous, ongoing, or potential compliance failures?
- Find the opportunities
- Draft summary of your key points



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## BACK TO THE TABLE

- ❖ Make sure you're included in meetings to discuss findings
- ❖ LISTEN to what others have found in their reviews
- ❖ Share your findings
  - ✓ Accentuate the positive
  - ✓ Highlight any red flags you may have noticed
  - ✓ Any "deal breakers"?
    - Any mitigation needed before the acquisition?
    - Any mitigation needed after the acquisition?



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## REMEMBER DOJ'S GUIDANCE

- ❖ What has been the company's process for tracking and remediating misconduct or misconduct risks identified during the due diligence process?
- ❖ What has been the company's process for implementing compliance policies and procedures, and conducting post-acquisition audits, at newly acquired entities?



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## PUTTING IT ALL TOGETHER

- ❖ **Create a worksheet that summarizes your findings and next steps**
- ❖ **What was the scope of your review**
  - ✓ What you did
  - ✓ How you did it
- ❖ **What are your basic conclusions?**
  - ✓ Risks
  - ✓ Compliance liabilities
  - ✓ Any compliance-related obstacles?



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## COMPLIANCE WORKPLAN

- ❖ **How will you integrate this new entity into your program**
- ❖ **Do you have the staff to complete these steps?**
- ❖ **Will you be integrating compliance staff from the other organization?**
  - ✓ Don't forget EQ!



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## IMPLEMENTATION

### ❖ Tasks that must be completed:

- ✓ Immediately
- ✓ First 30 days
- ✓ First 60 days
- ✓ First 90 days



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## ARE YOU FINISHED?

- ❖ Not really
- ❖ Reflect on your process
  - ✓ What worked?
  - ✓ What changes would you make?
- ❖ Don't ignore the workplan
- ❖ Are you completing the tasks?
  - ✓ Have compliance-related offenses been mitigated?
- ❖ Is your timeline working?



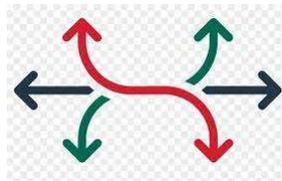
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## ALWAYS REMEMBER

- ❖ Welcome the new organization
- ❖ Document, document, document
- ❖ Continually review the process and outcomes



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## THANK YOU FOR YOUR TIME

Questions?

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