



# DUE DILIGENCE IN A DYNAMIC HEALTH CARE LANDSCAPE

**Bloomberg**  
**BNA**

OBER | KALER

# Introduction

The introduction of the Affordable Care Act (ACA) has brought significant changes to the health care industry. It has transformed how health care services are delivered and reimbursed, which has resulted in additional financial strains on providers. The new health care era is focused on moving away from a fee-for-service model to a value-based payment model, which has hospitals and health care companies scrambling to realign services and drive greater collaboration in order to coordinate care and reduce costs. As a result, the industry is experiencing a flurry of consolidations, mergers and acquisitions, and joint venture activity.

## The Challenges

Beyond the typical due diligence and deal-structuring tasks, today's health care deals also require compliance with complex government regulations at the state and federal levels. Venture capitalists, investment bankers and in-house counsel must be

attuned to a myriad of legal issues—such as antitrust and tax concerns, licensing and permitting, and compliance with fraud and abuse laws (including the federal Stark Law and Anti-Kickback Statute).

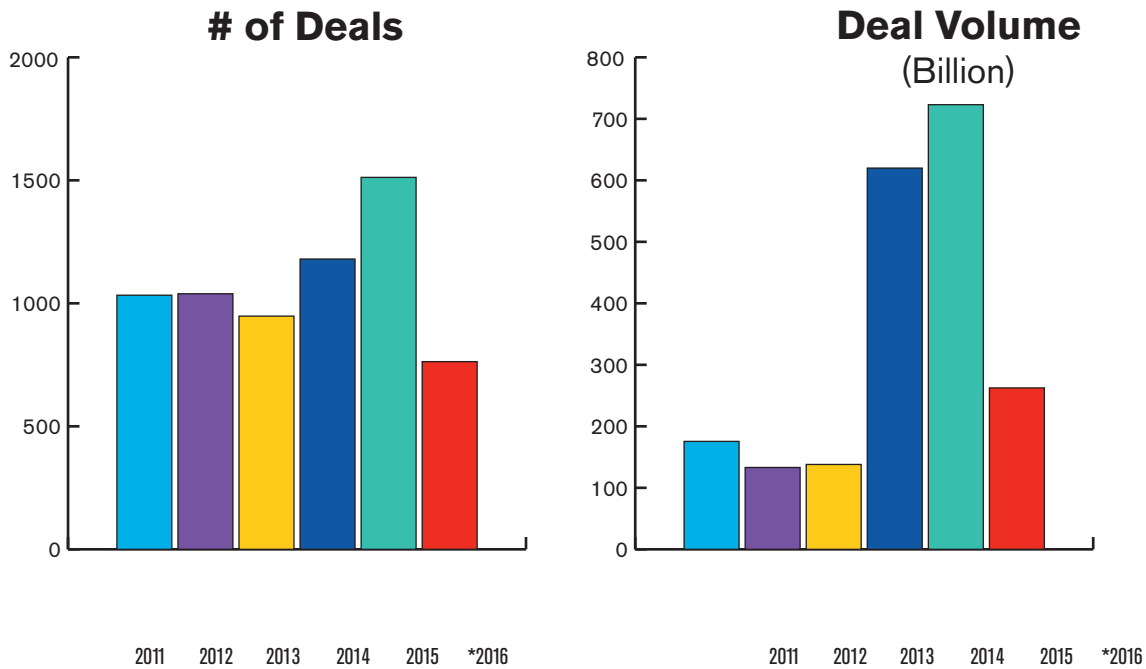
## Drivers of Merger Mentality

There are three overriding factors that are affecting this current climate of mergers and acquisitions within the health care industry nationwide.

1. The ACA has health care companies moving to improve the delivery of patient care, improve the overall health of patient populations, and reduce health care costs.
2. The financial strains on health care providers are numerous—and, in many cases, overwhelming. The federal government continues to squeeze Medicare and Medicaid reimbursement
3. The favorable capital environment continues to support both small and large transactions. There is a great deal of private equity available to support health care deals and M&As in the current marketplace.

**“Today’s health care deals also require compliance with complex government regulations at the state and federal levels.”**

## Health Care Industry M&A Activity, 2010-2016



\*First half data only

Source: Bloomberg Law Corporate Transactions: M&A Analytics

### What Does This Mean for Health Care Law?

This climate of joint ventures and M&As means that everyone involved in these transactions must be well versed in the legal issues that arise in structuring these new and complex deals. This includes a keen understanding of the following topics.

- **Government oversight** and enforcement of health care laws. (How can we stay out of trouble with the government?)
- **Due diligence.** (How can we identify risks and predict issues with M&As and joint ventures?)
- **Physician relationships.** (Should we evaluate our financial arrangements for compliance with the Stark Law and Anti-Kickback statute?)
- **Payment model changes,** both current and anticipated, for hospitals and newly formed health care entities. (How will new payment systems impact our bottom line?)

## Government Oversight: Anticipate Major Challenges

Health care transactions pose daunting challenges because of the need to comply with complex federal and state regulations, follow standard deal terms, and perform expanded due diligence. In addition, the likelihood of government investigations continues to rise as enforcement initiatives grow.

Here is a closer look at some of the most important federal requirements to remember.

### **The Federal False Claims Act (FCA)**

imposes liability on any person who submits a claim or causes a claim to be submitted to the federal government that is known to be false; an individual who may knowingly submit a false record in order to obtain payment from the government; or someone who obtains money from the federal government to which they may not be entitled, and then uses false statements or records to retain the money (31 U.S.C. §3729). Penalties for violations of the FCA range from \$5,500 to \$11,000 per claim plus treble damages, which can add up quickly.

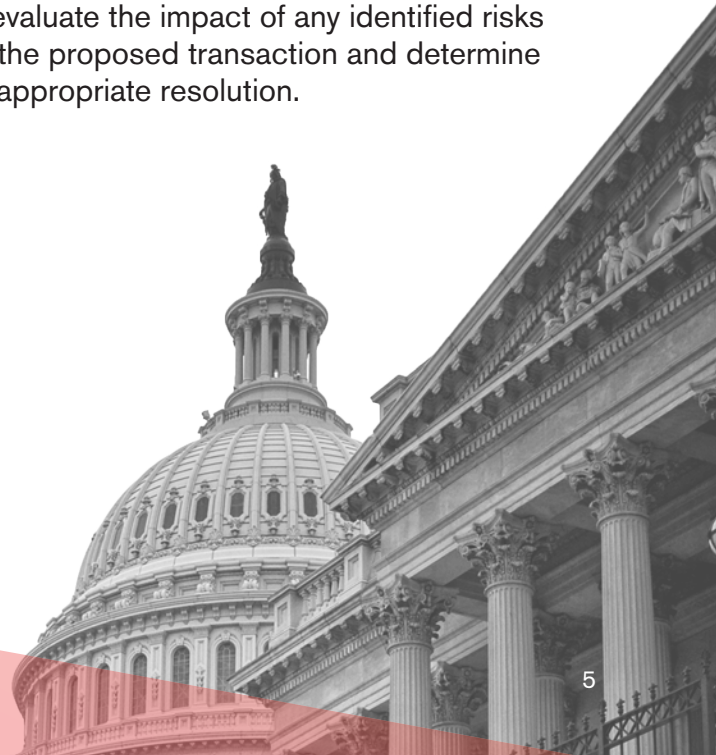
- It's important to understand that the FCA states that any "identified" overpayments must be reported and returned within **60 days**; failure to repay within 60 days can create FCA liability.
- The FCA also contains a whistleblower provision, or "qui tam" action, that states private parties may bring an action on behalf of the United States (31 U.S.C. 3730 (b)). These private parties, known as "qui tam relators," may share in a percentage of the proceeds from an FCA action or settlement.

### **The Stark Physician Self-Referral Law**

prohibits a physician from making referrals to an entity for designated health services if the physician (or an immediate family member) has a "financial relationship" with the entity unless an exception applies (42 U.S.C. §1395nn). Careful: detailed review of all physician financial relationships and contracts is a must!

**The Anti-Kickback Statute** prohibits the provision of any economic benefit in exchange for the referral of patients or businesses that will be reimbursed under any federal health care program (42 U.S.C. §1320a-7b(b)).

In addition to the fraud and abuse laws, state licensing requirements and other health care regulations can impact the viability of a proposed transaction. The due diligence process should be designed to identify and quantify the risk of the proposed transaction. Health care attorneys and corporate counsel should be prepared to evaluate the impact of any identified risks on the proposed transaction and determine an appropriate resolution.



## Due Diligence: Identify Risks and Predict Issues Before You Seal the Deal

Before embarking on an M&A transaction, attorneys must know what the client is getting into and do the homework up front to avoid major headaches along the way.

Ask the important question: Is this potential consolidation, merger, acquisition or joint venture really a good fit?

### Historical Objectives to Consider Before Hitting 'Go' on the Deal

- Confirm authority to operate as is, or as contemplated.
- Evaluate the financial health and stability of business relationships.
- Obtain a comfort level on tax-exempt status or payment of taxes.
- Assess the cultural fit, governance structure and synergies.
- Identify legal impediments that could block the deal.
- Determine what liabilities each party would be undertaking in order to negotiate appropriate indemnity and other protections.
- Verify compliance with loan, bond and other covenants.
- Uncover any major environmental problems.
- Obtain information necessary for various filings/approvals.

**“Ask the important question: Is this potential consolidation, merger, acquisition or joint venture really a good fit?”**

### Understand the business and how it operates:

- Conduct interviews with organizational leaders.
- Risk of post-merger exodus.
- Review documents in the data room.
- Perform internal assessments and internal/external audits; assess the status of repayments and other corrective actions and/or pending appeals and request additional information as needed.
- Understand the billing and coding system of the entity and identify any potential risks or compliance issues.
- Follow up on potential concerns and any other open issues.

### Due Diligence Objectives for Today's Health Care M&A Climate

In addition to the historical due diligence objectives, today's deals require new considerations:

- Identify and quantify potential exposure on compliance issues.
- Leverage on price and other terms.
- Consider the appropriateness of disclosures and settlements pre- (or post-) closing.
- Understand the risks of sharing legal analyses relative to attorney-client privilege and work product protection; facts are not privileged.
- Consider use of common interest privilege.



## Physician Relationships: Look Closely at Provider Contracts as Part of the Deal

As part of the M&A deal and in light of fraud and abuse laws, it is important to look at all financial relationships with physicians and/or physician practices to ensure compliance with the laws. Some factors to consider as the transaction moves forward include:

- What practices and employed physician groups will the buyer obtain or become affiliated with as part of an acquisition or joint venture?
- In many cases, physicians are a key component of the deal – do they want to be a part of it? Will they back out?
- Does the practice have any compliance issues that need to be addressed up front?
- What are the physician billing practices? Are there potential over-billing or coding issues?
- Are the physician contracts and compensation structure consistent with fair market value and commercial reasonableness?

- Have the physician relationships been structured to comply with the Stark Law and Anti-Kickback statute?
- How will identified compliance concerns be resolved: disclosure to the government? Repayment?

Careful review of physician contracts and relationships is essential at the beginning of the due diligence process to identify potential problems, evaluate the impact on the deal, modify the terms of the deal as necessary to account for the identified risk, and ultimately avoid surprises post-closing.

### Consider how the deal will allow you to leverage:

- Pay-for-performance
- Accountable care organizations
- Bundled payment programs





## Payment Models: Evaluate the Impact of New Trends and Innovations

The ACA and other health care reform efforts are transforming the payment system to promote a more efficient health care delivery system. The Center for Medicare and Medicaid Innovation within the U.S. Department of Health and Human Services is a major facilitator of these value-based initiatives: pay-for-performance models, accountable care organizations, and bundled payment programs.

By moving away from a system that looks at quantity to one that looks at quality, providers are rethinking how they operate—with a particular focus on collaboration among providers across the care delivery spectrum. Along these lines, an evaluation of the impact of these new payment models on anticipated revenue is a necessary part of any due diligence effort.

**“Providers are rethinking how they operate.”**

Content written by

O B E R | K A L E R

## **Ober|Kaler Health Law: The Experience Needed to Impact the Future in Health Care Mergers and Acquisitions**


The health care industry continues to evolve as a result of the Affordable Care Act and stricter government regulations and oversight. Health care itself is being delivered in new ways, with a focus on patient-centered care, efficiencies, cost reductions and elimination of waste in the delivery system. To evolve along with the changing industry, hospitals, health care entities, and physicians continue to explore

and enter new affiliations, joint ventures, and partnerships to provide better value in the services they provide. This consolidation and M&A trend will remain as the industry continues to progress. **Ober|Kaler's Health Law practice has the tools, resources and experience needed to guide you through the complex health care M&A landscape.**

### **Contact an Ober|Kaler Health Law Attorney:**

Robert D. Clark	202-326-5039 or rdclark@ober.com
S. Craig Holden	410-347-7322 or scholden@ober.com
Julie E. Kass	410-347-7314 or jekass@ober.com
Catherine A. Martin	410-347-7320 or camartin@ober.com
William T. Mathias	410-347- 7667 or wtmathias@ober.com
Sanford V. Teplitzky	410-347- 7364 or teplitzky@ober.com

**For valuable information, industry insights and health law resources, visit the Ober|Kaler Health Law Portal at [www.oberhealthlaw.com](http://www.oberhealthlaw.com).**



# Bloomberg BNA

© 2016 The Bureau of National Affairs, Inc.  
0716-JO20660