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ACCESS TO CAPITAL

Not-for-Profit Hospital Conversions
A Case Study
September 13, 2012

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Today’s Presenters

Matthew Goldreich  
Managing Director  
Cain Brothers & Company

Kenneth D. Hawkins  
Senior Vice President,  
Acquisitions & Development  
Community Health Systems

Sally J. Dixon  
President and Chief  
Executive Officer  
Memorial Health Systems Corporation

Roger D. Strode  
Partner  
Foley & Lardner LLP

Today’s Agenda—Memorial Health Systems

- Hospital and Health System M&A Trends
- The Memorial Health Systems Story
- Community Health Systems
- Compelling Legal Issues
- Questions?
Hospital and Health System M&A Trends

Matthew Goldreich
Cain Brothers

Health Care Industry Trends
A Rapidly Changing Landscape

- The landscape is rapidly changing with both internal and external forces exerting pressure
  - Decades of cost inflation has resulted in an unsustainable cost level for US health care
  - Governmental payors are experiencing severe budget pressure
  - Cost shifting to private insurance can’t continue
  - PPACA is accelerating change
  - Physician shortages pose a challenge for all providers
  - Managed care consolidation has shifted leverage
  - Need to deploy scarce capital outside traditional uses
  - Better information leading to increased transparency
  - Mandated standardization
  - Retail markets, consumerism and social media

- These pressures are also resulting in many new forms of organizations with affiliations between hospitals, payors, physicians and other provider organizations

- Various experts and industry leaders suggest the successful hospital enterprise must reach at least $2 billion in annual revenues to absorb the administrative, compliance, technology, and risk-taking characteristics of long term sustainability
Health Care Industry Trends
Entitlement Program Costs and Projected Federal Budget

- The structural challenge of health care programs on the federal budget becomes the key driver of federal deficit growth by 2030, at which time Social Security peaks as a percentage of GDP.
- In addition to the challenge at the federal level, the Medicaid program has and is expected to continue to challenge state budgets resulting in cuts to Medicaid reimbursement rates.

### Percentage of Gross Domestic Product

<table>
<thead>
<tr>
<th>Year</th>
<th>Actual</th>
<th>Projected</th>
</tr>
</thead>
<tbody>
<tr>
<td>1962</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1972</td>
<td></td>
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</tr>
<tr>
<td>1982</td>
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<tr>
<td>1992</td>
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<td>2002</td>
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<tr>
<td>2072</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2082</td>
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</tbody>
</table>

- Medicare and Medicaid
- Social Security
- Other Spending (Excluding Debt Service)

**Source:** Congressional Budget Office

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Health Care Industry Trends
Observations on Health Care Reform Act (PPACA)

**Currently:**
Living in two worlds

**Near Term:**
New payment structures

**Intermediate Term:**
Integrated physician networks

**Long Term:**
"Commoditization"

- That clinical pressure cannot be differentiated based on patient concern for patient
- Patient payment systems strongly favor volume, particularly in the ED and hospital services
- ACOs, bundling, and bundled services, shared savings programs reflect allocation of hospitals and specialists

- Skilled providers cannot drive cost structure to offset lower revenue per admission
- Averting care to keep cost structures such as aggressive use of part-service care facilities.
- Caps on resource utilization necessary for accountability
- Decrease in value in certain service lines

- Require entering with minimal volume benefit
- New payment mechanisms will be necessary to achieve care coordination
- Employing ACOs on the same organization are not the same

- Emergency and quality measurement will initially differentiate provider models
- Per capita, quality and cost management provider models will struggle
- Consistency, low volume, high volume, chartered ownership provider models will differ
- Value measurement will also be unbalanced framework.
Health Care Industry Trends
Observations on Health Care Reform Act (PPACA) (Cont’d)

- The expected cumulative rate cuts in PPACA are staggering and impact alone will drive consolidation across the industry.

Patient Protection and Affordable Care Act
Cumulative Rate Cuts to Providers

| Years   | Hospital FFS Cuts | DSH Reductions | Shared Savings | Independent Payment Advisory Board
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>2012/2013</td>
<td>($14B)</td>
<td>($11B)</td>
<td>($19B)</td>
<td>($26B)</td>
</tr>
<tr>
<td>2014</td>
<td>($39B)</td>
<td>($52B)</td>
<td>($70B)</td>
<td>($97B)</td>
</tr>
<tr>
<td>2015</td>
<td>($126B)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: The Advisory Board

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Health Care Industry Trends
Physician Shortages: A Key Strategic Challenge

- Physician supply shortages that existed since 2005 will be exacerbated by health care reform
  - More demand, less supply to meet demand
- Resources dedicated to retain and recruit medical staff will need to expand
  - Cost and time to recruit will increase
  - Payments to physicians to support hospital needs will increase
  - Funding of “unfunded” residency slots to secure new physicians
- Physician integration strategies such as employment models, affiliated foundation models, PHOs, clinical management and consolidation of existing practices into larger groups is occurring

Estimated Physician Demand Trends

Source: Association of American Medical Colleges (Excludes expected physician supply needs as a result of health care reform)
Health Care Industry Trends

Managed Care Consolidation

- Since the mid-1990’s, the managed care industry has seen significant consolidation
  - In many markets, providers are price takers with reduced clout to secure favorable contract terms
  - Providers in markets that consolidate either horizontally (hospital/hospital) and/or vertically (hospital/physicians) are better able to offset concentration of managed care payors
  - PPACA limits on payor premium profits are shifting payor focus to provider business and reconfiguring the payor landscape to control risk dollars

Managed Care Companies (as a Percentage of Total Market Capitalization)

- 1995 – Total $40.6 billion
  - Top 5 = 67% of total
- 2000 – Total $54.5 billion
  - Top 5 = 83% of total
- 2012 – Total $144.7 billion
  - Top 5 = 86% of total

Health Care Industry Trends

Pioneer ACO Model

- The Pioneer ACO Model is a CMS Innovation Center imitative designed to support organizations with experience operating as ACOs or in similar arrangements to provide more coordinated care to beneficiaries at a lower cost
  - In order to be eligible to participate in the Pioneer ACO Model, organizations are ideally already coordinating care for a significant portion of patients under financial risk sharing contracts and be positioned to transform both their care and financial models from fee-for-service to a three-part aim, value-based model

Participating Pioneer ACO Organizations

<table>
<thead>
<tr>
<th>Organization</th>
<th>Service Area</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allina Health</td>
<td>Minnesota and Northern Wisconsin</td>
</tr>
<tr>
<td>Atrium Health</td>
<td>Eastern and Central Wisconsin</td>
</tr>
<tr>
<td>Banner Health Network</td>
<td>Phoenix, Arizona, Metropolitan Area</td>
</tr>
<tr>
<td>Atrius Health</td>
<td>Eastern and Northern Massachusetts</td>
</tr>
<tr>
<td>Banner Health Network</td>
<td>Northwest Wisconsin</td>
</tr>
<tr>
<td>Beth Israel Deaconess Medical Center</td>
<td>Eastern Massachusetts</td>
</tr>
<tr>
<td>Baptist Health</td>
<td>Greater Miami Area</td>
</tr>
<tr>
<td>Baptist Health</td>
<td>San Antonio, Texas</td>
</tr>
<tr>
<td>Dartmouth-Hitchcock ACO</td>
<td>New Hampshire and Eastern Vermont</td>
</tr>
<tr>
<td>EnovaCare Health System</td>
<td>Metropolitan Area</td>
</tr>
<tr>
<td>Eisenhower Alliance</td>
<td>Indiana, and Central Indiana</td>
</tr>
<tr>
<td>Centene</td>
<td>Southeastern Michigan</td>
</tr>
<tr>
<td>HealthCare Partners Network</td>
<td>Los Angeles and Orange Counties, CA</td>
</tr>
<tr>
<td>HealthCare Partners Network</td>
<td>Cleveland and New York</td>
</tr>
<tr>
<td>HealthCare Partners Network</td>
<td>Southern, Central, and Coastal California</td>
</tr>
<tr>
<td>Eversource Medical Group</td>
<td>Oklahoma, Georgia, and Surrounding South IL</td>
</tr>
<tr>
<td>Michigan Pioneer ACO</td>
<td>Southeastern Michigan</td>
</tr>
<tr>
<td>Mountain America</td>
<td>Montana, Wyoming, and Southern Idaho</td>
</tr>
<tr>
<td>MD Anderson Cancer Center</td>
<td>Texas and Oregon</td>
</tr>
<tr>
<td>PatientCare Services</td>
<td>Northern California</td>
</tr>
<tr>
<td>Partners Healthcare</td>
<td>Massachusetts and Rhode Island</td>
</tr>
<tr>
<td>PremierCare</td>
<td>San Diego County</td>
</tr>
<tr>
<td>Prisma Health</td>
<td>Greenville, South Carolina</td>
</tr>
<tr>
<td>Trinity Pinnacle ACO</td>
<td>Texas, Florida, and Georgia</td>
</tr>
<tr>
<td>University of Michigan Health System</td>
<td>Southeastern Michigan</td>
</tr>
</tbody>
</table>
Health Care Industry Trends
89 New Accountable Care Organizations

- Organizations throughout the US have established ACOs in anticipation of PPACA and as competitive actions to secure managed care contracts.

Capital Needs
- Substantial capital needed to invest in required infrastructure
- Additional capital resources will be necessary to manage risk in future shared savings, partial capitation and full capitation reimbursement scenarios

Patient Centered
- A network of primary care physicians, specialists, ancillary providers and hospitals clinically integrated to provide patient-centered comprehensive care

Accountability
- Foster provider accountability for quality and per capita patient cost

Performance Measurement
- Increased quality and health improvement through monitoring, reporting of patient information and providing analytics to support intervention

Payment Reform
- Fees for providers who deliver comprehensive care management plans and coordinate patient care
- Shared savings encourage collaboration, shared responsibility and reduction in cost while maintaining or increasing quality (value-based purchasing)

Success Factors
- Integrated physician and other provider network
- "Employment does not equal integration"
- "Employment does not equal integration"
- Systems and infrastructure
- Cultural transformation
- Financial capacity
Health Care Industry Trends

Size Matters

- Larger systems continue to benefit from a broader revenue base, economies of scale, and stronger operating margins.
  - Since the recovery began, the performance of health systems has rebounded more than stand-alone hospitals.
  - The higher ratings of health systems has led to greater access to affordable capital, especially as credit spreads remain high and weaker investment grade/below investment grade credits have had difficulty entering the capital markets.

S&P Not-For-Profit Health Care Ratings Distribution

Health Care Industry Trends

Provider and Payor Integration

- Recent consolidation activity has primarily been comprised of payer acquisitions of providers....
Health Care Industry Trends
Provider and Payor Integration (Cont’d)

... however, Partners HealthCare is a provider that recently acquired a payer. The landscape is changing across the health care continuum with transformational arrangement always a possibility.

Transaction Summary

- Partners HealthCare
- Neighborhood Health Plan
- Dignity Health
- HealthWorks
- Aetna
- Daveita
- Buffett Defense

Transaction Benefits and Nuances

- Partners to continue grow community health centers
- Neighborhood Health Plan will continue operations
- Dignity Health will continue operations
- HealthWorks to continue operations
- Aetna will continue operations
- Daveita Defense will continue operations
- Buffett Defense will continue operations
- Partners HealthCare
- Neighborhood Health Plan
- Dignity Health
- HealthWorks
- Aetna
- Daveita
- Buffett Defense

- Avoids duplicating efforts
- Strengthens ability to deliver high-quality health care
- Maintains 82,000 employees nationwide
- Ensures continued Catholic identity of future partners and their adherence to ERDs

Health Care Industry Trends
Not-for-Profit and For-Profit Partnerships

In 2011, Ascension Health (“Ascension”), the nation’s largest not-for-profit nonfederal health care system, formed a joint venture, Ascension Health Care Network (“AHCN”), with private equity fund Oak Hill Capital Partners (“Oak Hill”) to focus on acquiring troubled Catholic health systems across the country.

- Oak Hill provides strong financial backing for AHCN committing $400 million to the venture
- AHCN allows the private equity fund to invest in Catholic health systems that generally resist losing their Catholic identity to for-profit investors
- Oak Hill gains access to the operational experience of Ascension

- Ascension formed AHCN after its discussions with Caritas Christi collapsed due to Caritas Christi’s finances and the eventual acquisition by a subsidiary of Cerberus Capital Management
- AHCN allows Ascension to leverage its $1.5 billion capital commitment to acquire new hospitals in the planned four to five markets
- Ensures the continued Catholic identity of future partners and their adherence to ERDs
- Ascension will provide operational experience
- Ascension is planned to remain a 5% owner upon the eventual exit by Oak Hill to ensure hospitals owned by AHCN remain Catholic
Health Care Industry Trends
Not-for-Profit and For-Profit Partnerships (Cont’d)

- In January 2011, Duke University Health System ("Duke") and private equity firm, LifePoint Hospitals ("LifePoint"), joined forces to form a joint venture, Duke LifePoint Health Care ("DLP")
  - LifePoint provides access to financial and operational resources
  - LifePoint brings operational experience and is acting as managing partner
  - LifePoint is approximately 97% owner of DLP
  - DLP provides scale and allows LifePoint to capitalize on Duke’s strong brand
  - DLP makes LifePoint a more palatable partner in the potential acquisition of other not-for-profit hospitals

- Duke will enhance and develop needed clinical services
- Duke provides access to highly specialized medical services to help the communities’ needs
- Duke will have no significant capital exposure
- Duke will share the referral base without having to acquire hospitals and physician groups
- Duke’s principal source of income from DLP comes from fees associated with Duke’s participation

--

Health Care Industry Trends
Organizational Considerations

<table>
<thead>
<tr>
<th>Post Transaction Risk</th>
<th>Access to Capital</th>
<th>Affiliation Benefits</th>
<th>Level of Control</th>
</tr>
</thead>
<tbody>
<tr>
<td>High</td>
<td>High</td>
<td>Sale of assets</td>
<td>High</td>
</tr>
<tr>
<td>High</td>
<td>Low</td>
<td>Long term lease to another operator</td>
<td>Low</td>
</tr>
<tr>
<td>Low</td>
<td>High</td>
<td>Merge assets with larger provider network</td>
<td>High</td>
</tr>
<tr>
<td>Low</td>
<td>Low</td>
<td>Affiliation with larger provider network</td>
<td>Low</td>
</tr>
<tr>
<td>Low</td>
<td>Low</td>
<td>Affiliation Benefits</td>
<td>Level of Control</td>
</tr>
<tr>
<td>High</td>
<td>High</td>
<td>Status Quo</td>
<td>High</td>
</tr>
<tr>
<td>Low</td>
<td>Low</td>
<td>Management contract with another operator</td>
<td>Low</td>
</tr>
</tbody>
</table>

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Health Care Industry Trends
Advantages & Considerations

<table>
<thead>
<tr>
<th>Pros</th>
<th>Cons</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Remain Independent</strong></td>
<td><strong>Need to implement cost reductions and focus on efficiencies</strong></td>
</tr>
<tr>
<td>- Implement potential action plan to fend off challenges associated with operating a status quo strategy</td>
<td>- Need capital to be competitive in physician recruiting and marketing programs</td>
</tr>
<tr>
<td>- Retain governance and management control</td>
<td>- Competitive position will continue to be a significant challenge</td>
</tr>
<tr>
<td>- Opportunity to strengthen affiliation with TNMC</td>
<td>- Risk of TNMC partnering with Iowa Health, leaving NMHS no appropriate regional partner</td>
</tr>
<tr>
<td><strong>Joint Operating Agreement</strong></td>
<td><strong>Provides minimal capital support</strong></td>
</tr>
<tr>
<td>- Aligns organizations to achieve physician and clinical synergies as well as economies of scale without full asset merger</td>
<td>- Antitrust concerns</td>
</tr>
<tr>
<td>- Allows for more control</td>
<td>- Fewer synergies than in a full merger</td>
</tr>
<tr>
<td>- Maintain certain reserved powers</td>
<td>- More difficult to structure than a full merger due to non-compete concerns and only limited integration</td>
</tr>
<tr>
<td><strong>Partnership / Joint Venture</strong></td>
<td><strong>Loss of control</strong></td>
</tr>
<tr>
<td>- Balance between maintaining control of operations while seeking outside help</td>
<td>- Potential not-for-profit status may not continue going forward</td>
</tr>
<tr>
<td>- A partnership/joint venture relationship could help to relieve competitive pressures</td>
<td>- Foundation considerations</td>
</tr>
<tr>
<td></td>
<td>- Proceeds</td>
</tr>
<tr>
<td></td>
<td>- Support of facility going forward</td>
</tr>
<tr>
<td><strong>FP / NFP Sale</strong></td>
<td><strong>Local consolidation may raise antitrust issues</strong></td>
</tr>
<tr>
<td>- Strategic acquirer may be in a better position to address increased competitive risks</td>
<td>- Strategic partners can bring significant operational experience, capital and other resources</td>
</tr>
<tr>
<td>- Strategic partners can bring significant operational experience, capital and other resources</td>
<td>- Can often be more complicated to the seller without offering incremental benefits</td>
</tr>
<tr>
<td></td>
<td>- Generally takes longer to consummate such a transaction</td>
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</tbody>
</table>

**Joint Operating Agreement /FP / NFP Sale**

- Balance between maintaining control of operations while seeking outside help
- A partnership/joint venture relationship could help to relieve competitive pressures
- Strategic acquirer may be in a better position to address increased competitive risks
- Strategic partners can bring significant operational experience, capital and other resources
- Loss of control
- Potential not-for-profit status may not continue going forward
- Foundation considerations
  - Proceeds
  - Support of facility going forward
- Local consolidation may raise antitrust issues

**FP / NFP Sale**

- Provides minimal capital support
- Antitrust concerns
- Fewer synergies than in a full merger
- More difficult to structure than a full merger due to non-compete concerns and only limited integration
- Aligns organizations to achieve physician and clinical synergies as well as economies of scale without full asset merger
- Allows for more control
- Maintain certain reserved powers
- Local consolidation may raise antitrust issues
- Can often be more complicated to the seller without offering incremental benefits
- Generally takes longer to consummate such a transaction

Health Care Industry Trends
Hospital M&A Trends

- Hospital transactions have been exceptionally strong over the last two years
- Over the past 13 years the average number of deals was 73 annually
- Major 2011 & 2012 transactions include:
  - Vanguard’s joint venture with Valley Baptist Health System (Cain Brothers’ client)
  - HCA purchase of Catholic Health East’s Mercy Hospital in Florida
  - Jewish Hospital & St. Mary’s Healthcare merger with Saint Joseph Health System
  - Emory’s joint venture with Saint Joseph’s Health System in Atlanta (Cain Brothers’ client)
  - Lahey Clinic’s affiliation with Northeast Health System (Cain Brothers’ client)
  - Lifepoint’s joint venture with Duke Healthcare
  - Highmark’s proposed acquisition of West Penn Allegheny Health System (Cain Brothers’ client)
Health Care Industry Trends
M&A Activity Significant Among All Provider Sectors

- Not-for-profit systems continue to have a significant role in transaction activity
  - 78% of all transactions since 2001 have involved a not-for-profit system as either a target, acquirer or both

- Joint-ventures with for-profit health care systems are increasingly used to address key challenges
  - Capital constraints
  - Market consolidation

The Memorial Health Systems Story

Sally J. Dixon
Chief Executive Officer
Memorial Health Systems Corporation
Memorial Health Systems Corporation Profile

- Revenue
- Assets
- Beds
- Services and physician complement
- General characteristics of the market
- Payors
- Competition

Rationale for Seeking a Strategic Partner

- Looked at a vision of a “successful” MHS
- Inability to finance a badly needed new hospital facility
- Lack of resources to recruit and employ physicians
- Lack of resources to access talent
- Need for more management resources
- Daunting regulatory and reimbursement environment
Review of Strategic Alternatives

- Prior to seeking a capital partner, MHS engaged a strategic consultant to consider myriad of strategic alternatives (to sale)
  - Need for capital—new facility
  - Recruiting issues
  - Rapidly changing legal and reimbursement environment
  - Desire to maintain “choice” in the market
- Following review of strategic alternatives decision was made to seek a capital partner

Search for Capital Partner
Deal Makers and Deal Breakers

- Cain Brothers’ process
- Participation of MHS board in process

Deal Makers
- Price
- Willingness of CHS to finance a new hospital facility
- Willingness of CHS to maintain services and capital funding at certain levels for a defined period of time
- Creation of a “community board”

Deal “Breakers”
Community Health Systems

Kenneth D. Hawkins
Sr. Vice President of Acquisitions & Development
Community Health Systems

Types of hospitals/health systems that companies, such as CHS, look for and find most attractive:

- Growing, non-urban and selected urban markets; 20,000 to 400,000 stable or growing population base
- Favorable demographic and economic trends
- Competition – non-urban/lower managed care
- Opportunities in urban markets to create networks
- Diverse employment – not dependent upon a single employer
- Potential for service expansion
- Have financial performance that will benefit from our management skills
What companies, such as CHS, can provide to hospitals, health systems and the communities/patients they serve:

- Access to Capital
  - Invest in Facilities
  - Invest in Equipment
  - Physician recruitment
- Improve Hospital Operations
- Investment in tools, resources and processes (Studer Program) to improve quality, patient safety, patient and physician satisfaction
- Physician recruiting
- Local Community Board
- Purchasing
- Pay Local Taxes
- Local Foundation established
- Professional growth for employees
- Economic growth in the Community

CHS Resources

- Acquisitions
- Ancillary Services
  - Pharmacy
  - Laboratory
  - Surgery
  - Imaging
- Billing and Collections
- Compliance
- Community Cares
- ER Management
- Executive Recruitment
- Facilities Management
- Financial Reporting & Control
- Group Purchasing
- Home Health
- Information Systems
- Insurance Programs
- Joint Commission
- Legal Services
- Managed Care
- Marketing
- Patient & Physician Satisfaction
- Physician Advisory & Leadership Groups
- Physician Recruiting & Support
- Quality/Resource/Case Management
- Revenue Strategies
- Senior Circle
- Specialty Services
Compelling Legal Issues

Roger Strode
Partner
Foley & Lardner LLP

State Cy Pres and Charitable Trust Issues
Board Duties
Antitrust Laws
Due Diligence and Compliance
Transaction Document Issues
Cy Pres and Charitable Trust Issues

- Conversions of non-profit hospitals to for profit use often trigger state laws/doctrines aimed at protecting tax exempt assets
- Many states (through statute or practice) require some level of state review—often through the Attorney General
  - May require “approval” in some state (e.g., PA)
  - May also require court approval (e.g., PA Orphan’s Court)
- Highly recommended that the State AG be contacted early in the process so as to avoid “surprise” or embarrassment

Cy Pres and Charitable Trust Issues

- AG will be interested in:
  - Identity of the buyer and whether the buyer is the type of organization that will preserve the mission of the selling hospital
  - The process used to reach the ultimate decision
    - Process sometimes more important than the decision
  - The price, if any, to be received for the hospital and whether the price is fair
    - Consider appraisals and/or fairness opinions
  - How the net transaction proceeds will be used
    - Often, a foundation is established to hold proceeds
    - Many AGs require that foundation fund only “health care” needs
Board Duties

- Board members are fiduciaries and have certain duties to the entity when considering a transaction:
  - Duty of Care
  - Duty of Loyalty

Board Duties—Duty of Care

- **Duty of Care**—Act in an informed, good faith manner when participating in board decisions; exercise the care of an ordinarily prudent person in a like position.
  - Business Judgment Rule—decision to be sufficiently informed, in good faith and in the honest belief that the action taken is in the best interests of the organization, and is made by disinterested trustees
  - Often the focus of BJR is on process
Board Duties—Duty of Loyalty

- **Duty of Loyalty**—Trustee to exercise his or her power in good faith and in the best interests of the hospital and its mission, *not* in his or her own interests or the interests of another person or entity
  - Consider any conflicts of interest, such as offers of employment from the buyer,
  - Trustees also must maintain the confidentiality of the process and any decisions made by the Board.
  - Particularly challenging for physician trustees

Board Duties—Practical Tips

- Focus on an informed process—understand what the Board doesn’t know
- Focus on the mission of the hospital and its service to the community
- Be skeptical and ask questions—don’t simply accept whatever is tossed at you
- Hire subject matter experts (e.g., legal counsel, financial advisors)
- Ferret out conflicts early in the process and require that any Board members with significant conflicts recuse themselves
Antitrust Laws

- Particular focus of the Federal Trade Commission these days
  - Rockford Memorial/OSF Transaction
  - Promedica/St. Luke’s Transaction
  - Phoebe Putney Transaction
- Regulators looking at impact of a transaction on both hospital services and physician services
- If acquiring entity not already in the market, substantive antitrust concerns are lessened (e.g., CHS/Memorial transaction)

Antitrust Laws—HSR Filing Issues

- If each of the transaction parties are large enough and the transaction itself is large enough, the parties will be required to make an HSR Filing with the Federal Trade Commission and Department of Justice
  - Size of Parties Test:
  - Size of Transaction Test:
- Both parties required to file
- If filing necessary, take care in the creation of so-called “4(c)” documents
- Once an HSR filing is made, the transaction cannot be consummated until the HSR waiting period has expired (either by passage of time or through early termination)
Antitrust Laws—Practical Tips

- If concern over market concentration, consider hiring an economist to do a market study
  - HHI analysis
  - Diversion analysis
- Payors are likely complaining parties—consider engaging with payors and large employers to explaining the benefits of the combination
- Consider adopting and following antitrust protocols
  - May help avoid “gun jumping” (i.e., the premature exchange of competitively sensitive information)
  - May help avoid creation of problematic 4(c) documents

Due Diligence and Compliance

- NFP-FP transactions often structured as asset purchases
- Among the assets purchased are, usually, receivables and FHCP provider numbers—deal structure carries with it significant “successor” liability
- Sophisticated buyers very concerned about liability around coding, billing, Stark Law violations and Anti-Kickback risks
- Sophisticated buyers will undertake significant amounts of due diligence in order to sort out risks
- Highly recommended that sellers undertake their own due diligence review of themselves prior to marketing the hospital in order to uncover any potential significant risks
  - Issues discovered late in sale process can cause deals to unwind
  - Purchase price will never go up, only down
Transaction Issues

- Expect robust representations and warranties
- Expect robust indemnification obligations
  - Fundamental reps and warranties will survive for extended periods
- Indemnities will be supported by escrows
- In lieu of escrows, resulting foundations may be asked guarantee obligations under the purchase agreement

Questions & Answers
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Mark Your Calendar

- **2012–2013 Access to Capital Sessions**
  - **October 2012:** Affiliations between Non-Profit Health Care Providers
  - **January 2013:** Private Debt Placement for Health Care Providers
  - **February 2013:** Preparing your Institution for Affiliation
Thank You

- A copy of the PowerPoint presentation and a multimedia recording will be available on our Web site within 2-3 days: [http://www.foley.com/access-to-capital-not-for-profit-hospital-conversion-transactions—a-case-study/](http://www.foley.com/access-to-capital-not-for-profit-hospital-conversion-transactions—a-case-study/)

- We welcome your feedback. Please take a few moments before you leave the Web conference today to provide us with your feedback: [http://www.zoomerang.com/Survey/WEB22GN9BGM5MP](http://www.zoomerang.com/Survey/WEB22GN9BGM5MP)