



EDUCATIONAL RESOURCES



HOME HEALTH



HOSPICE

PREPARING FOR THE DEAL

What You Should Know About Home Health and Hospice Mergers and Acquisitions

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ACCREDITATION COMMISSION *for* HEALTH CARE

TOPICS

- Home Health and Hospice Industries
- Transaction Process
- Tips for Buyers and Sellers



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HOME HEALTH AND HOSPICE INDUSTRIES

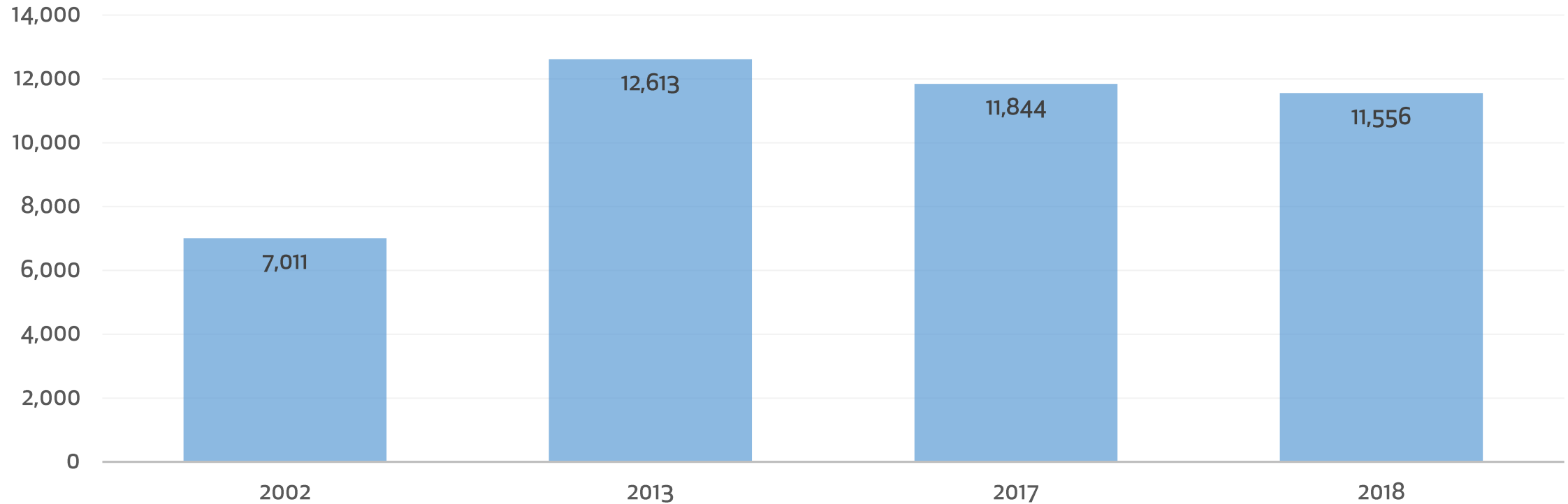
Services; Historical Growth in Industry; Payor Sources; Merger
and Acquisition Activity

SERVICES OF HOME HEALTH AND HOSPICE PROVIDERS

- Home Health
 - Individuals confined to their homes who need part-time or intermittent skilled care
 - Skilled nursing, physical therapy, occupational therapy, speech therapy, aide services, and medical social work
- Hospice
 - Terminally ill individuals with a life expectancy of six months or less
 - Palliative and support services, including nursing and physician services; counseling and social services; aide and homemaker services; drugs and biologicals for symptom control; physical, occupational, and speech therapy; medical equipment and supplies; and bereavement services

GROWTH IN INDUSTRY

Number of Participating Home Health Agencies Since 2002

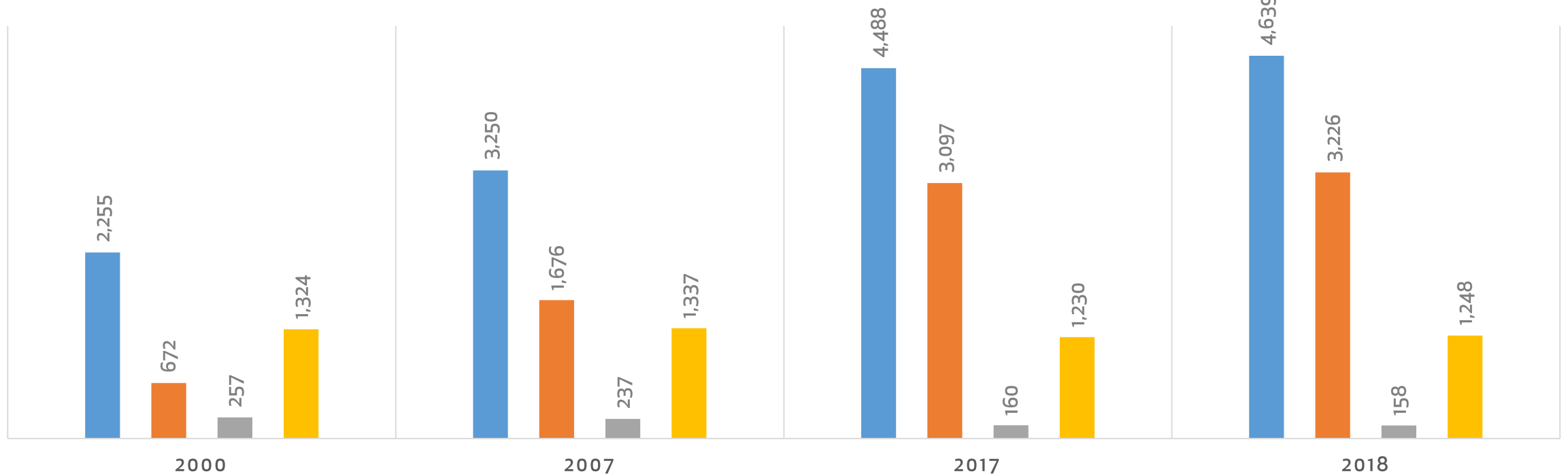


Source: MedPac, Report to Congress: Medicare Payment Policy (Mar. 2020)

GROWTH IN INDUSTRY

Number of Hospice Providers Since 2000

■ All Hospices ■ For Profit ■ Government ■ Nonprofit



Source: MedPac, Report to Congress: Medicare Payment Policy (Mar. 2020)

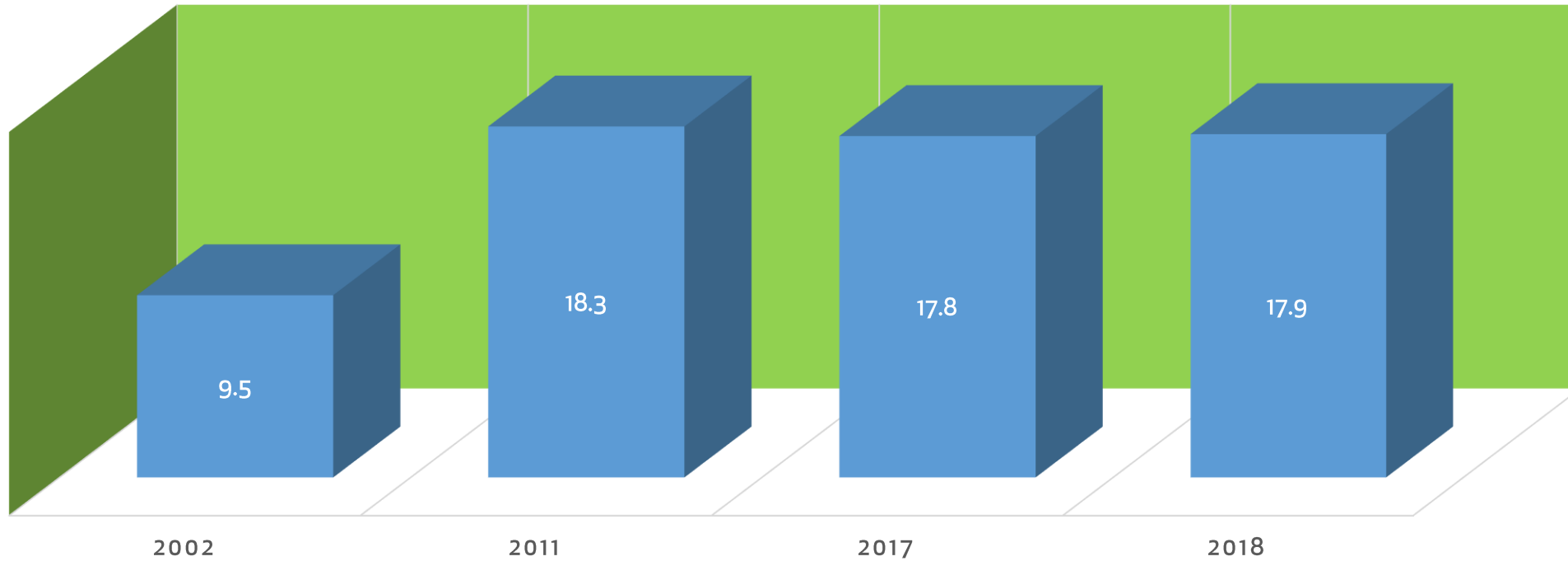
CONCENTRATION OF PAYOR SOURCES

- Medicare, Medicaid, and other Governmental Programs
- Medicare Margins
 - 15.2% for Freestanding HHAs in 2017
 - 15.3% for Freestanding HHAs in 2018
 - 15.3% for Freestanding Hospices in 2017
- Medicare Payment Structure
 - Home Health
 - Hospice

Hospice Category	Base Rate FY 2020
Routine Home Care	\$195 per day (Day 1-60) \$154 per day (Day 61+)
Continuous Home Care	\$58 per hour
Inpatient Respite Care	\$450 per day
General Inpatient Care	\$1,021 per day

MEDICARE PAYMENTS FOR HOSPICE

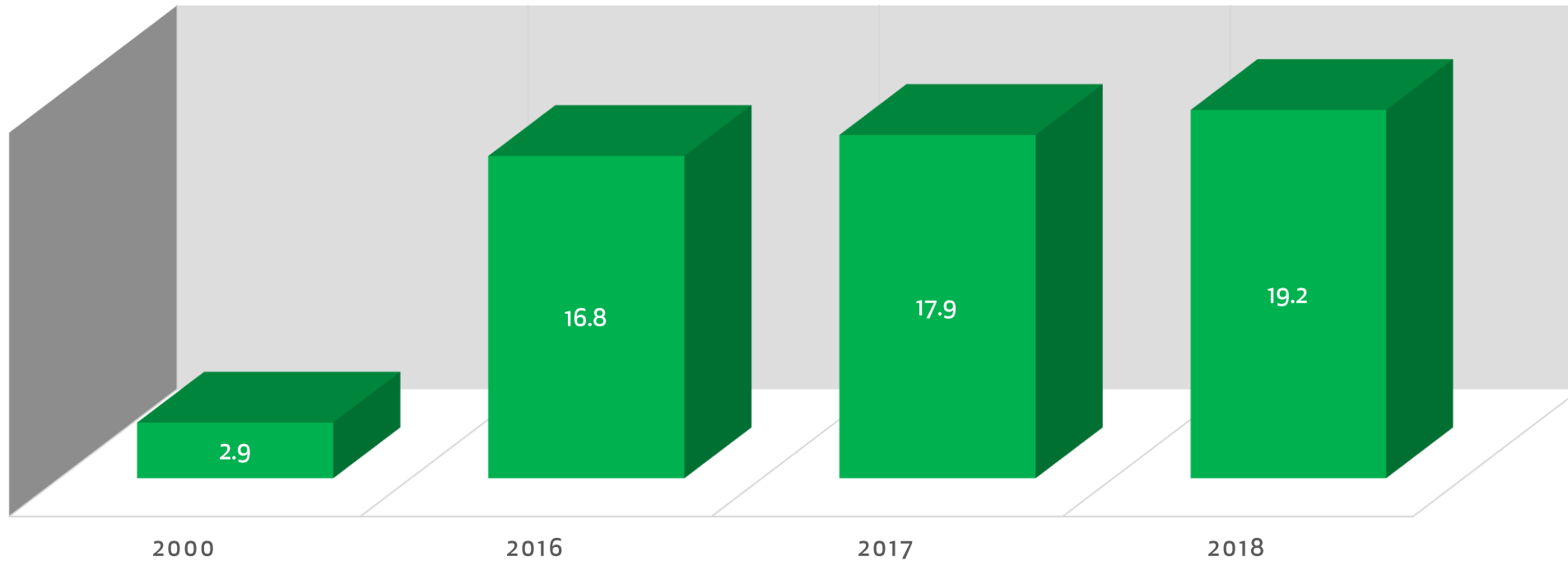
Payments in Billions



Source: MedPac, Report to Congress: Medicare Payment Policy (Mar. 2020)

MEDICARE PAYMENTS FOR HOSPICE

Payment in Billions



Source: MedPac, Report to Congress: Medicare Payment Policy (Mar. 2020)



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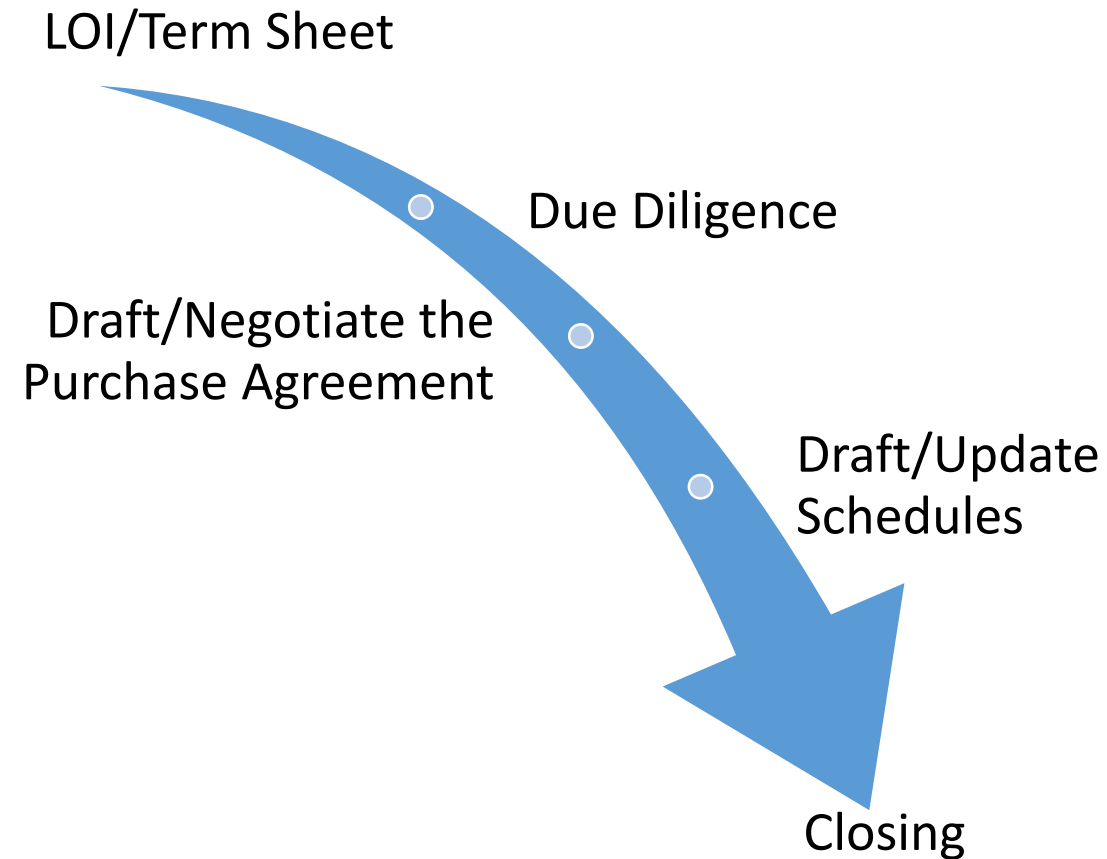


HOSPICE

TRANSACTION PROCESS

Letter of Intent; Diligence; Purchase Agreement;
Closing and Transition

THE TRANSACTION PROCESS



LETTER OF INTENT: SELLER'S PERSPECTIVE

- The purpose is to formalize a non-binding meeting of the minds to justify the time and expense required to pursue the deal
- Seller's perspective:
 - More specificity
 - Purchase Price
 - Payment timing and structure
 - Limitations on post-closing exposure (i.e., baskets and caps)
 - Confidentiality (if no separate CA or NDA)

LOI: BUYER'S PERSPECTIVE

- Buyer's perspective:
 - Specificity with room to negotiate pending diligence results
 - Possibility of escrow funds and/or holdbacks
 - At a minimum, mention representations and warranties are expected to be customary for transactions of like kind and size
 - Usually silent on indemnification expectations
 - Exclusivity



DILIGENCE CATEGORIES



- Corporate/Organizational Structure
- Financial/Tax
- Employment
- Litigation (and other administrative investigations/proceedings)
- Material Contracts
- Intellectual Property
- Regulatory

DILIGENCE: SCOPE

- Equity acquisition
 - The Buyer is stepping into Seller's shoes as the owner of company
 - Takes the good, the bad, and the ugly
 - Diligence is crucial and typically much more detailed
- Asset acquisition
 - The Buyer typically acquires the assets free and clear of all liens, security interests, and other encumbrances
 - No, or very few, liabilities are assumed
 - Diligence is still crucial, but not as detailed as compared to an equity deal
 - For example, less emphasis on employees, contracts, and taxes (depending on what Buyer is assuming)

DILIGENCE: SCOPE



- Asset acquisition of Medicare Provider
 - Change of ownership filing results in an automatic assignment of Medicare provider agreement
 - Successor liability is a consequence of the automatic assignment
 - Options
 - Expressly reject assignment and
 - Submit an initial enrollment application or
 - Transfer assets to existing provider number
 - Robust due diligence

DILIGENCE: EMPLOYMENT CONSIDERATIONS

- A Buyer wants to know who the employees are, their current roles, years of service, benefits, and other compensation
- This creates a snapshot of the company's payroll obligations and helps identify employment issues (e.g., misclassification) moving forward
- It also sets a baseline – a Buyer does not want to be surprised post-closing with employees saying “[Seller] promised me _____”
- Also want to see all employment agreements, non-competes, non-solicitation agreements, confidentiality agreements, independent contractor agreements, workers' comp claims, and benefit information (if any)

DILIGENCE: FINANCIAL/TAX CONSIDERATIONS

- A Buyer wants to know how the company is taxed
- The easiest way to determine this is request tax returns for the last 3 years
- On the financial side, want to see balance sheets and income statements and determine whether any debts or other liabilities exist outside of such financial statements
- Therefore, Buyers typically request financial statements (audited or unaudited) for the last 3 years and a schedule of all outstanding debt

DILIGENCE: CORPORATE CONSIDERATIONS

- These requests are much more important in an equity transaction
- Buyers want to see:
 - all formation and governing documents (e.g., bylaws, shareholder agreements, company/operating agreements, etc.)
 - stock books and equity ledgers
 - organizational charts (showing all direct and indirect owners and all officers, directors, and managers)
 - whether any options or convertible securities exist
 - a list of jurisdictions in which the company owns property and/or operates
 - any previous transactions the company was a party to outside the ordinary course of business

DILIGENCE: CONTRACT CONSIDERATIONS

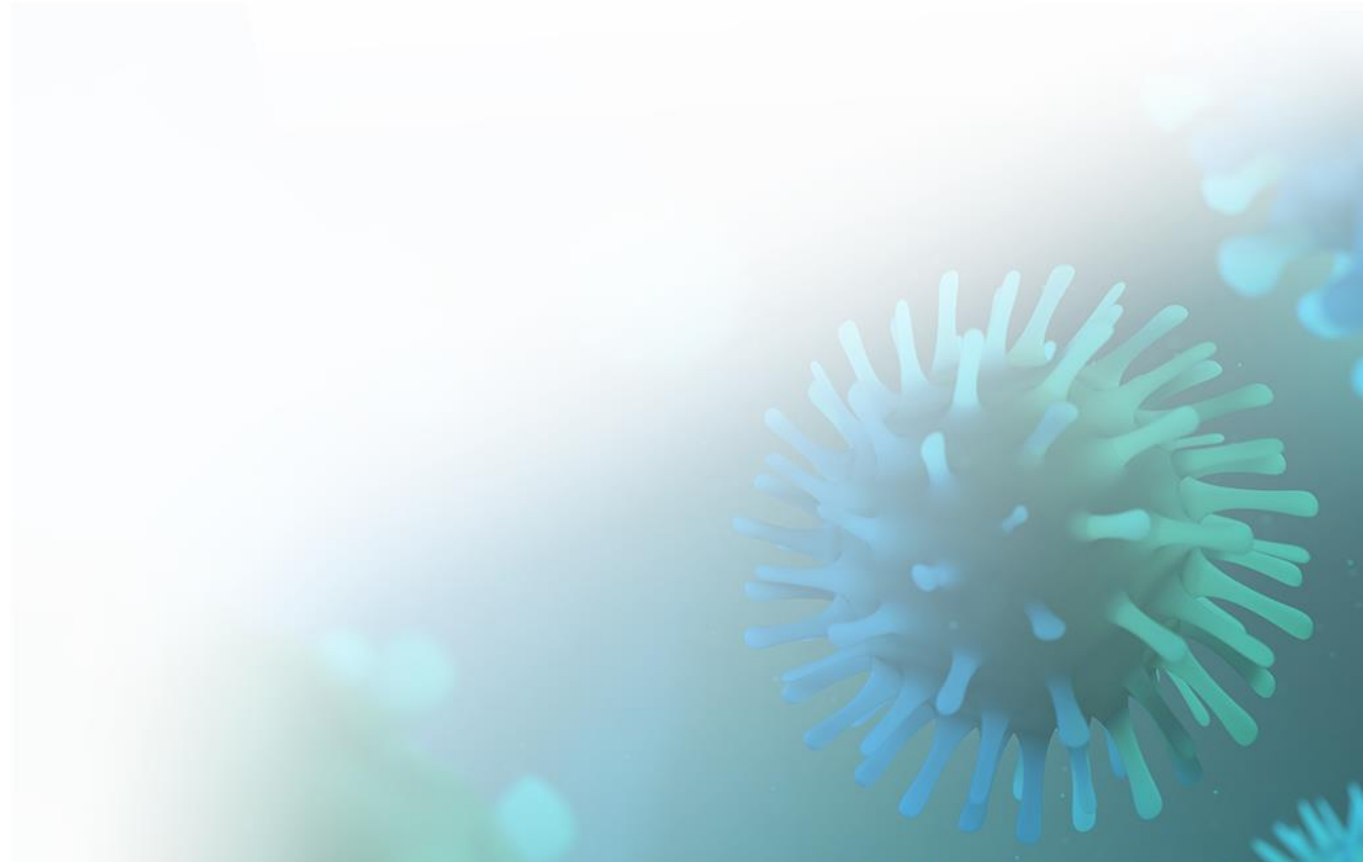
- In an asset deal, no contracts may be assumed by the Buyer
- However, even if a Buyer is obtaining its own contracts, it may be helpful to review the Seller's contracts to understand the current customers, vendors, and terms with each
- In an equity deal, Buyers want to see **all** contracts but especially those that are valuable to the enterprise
- In doing so, the review places an emphasis on identifying pre- and post-closing notice and consent requirements
 - These third-party issues are capable of delaying, or even killing, transactions

DILIGENCE: LITIGATION CONSIDERATIONS

- From a strictly legal perspective, Buyers do not want to buy assets or a company that is, or could be, the subject of litigation, audits, investigations, or other administrative proceedings
- Therefore, it is critical to confirm:
 - That all prior claims and litigation have been completely settled and there are no continuing obligations
 - There are no pending lawsuits, audits, investigations, or other administrative proceedings
 - There are no threatened claims, audits, investigations, or other administrative proceedings

DILIGENCE: COVID-19 CONSIDERATIONS

- Impact on workforce, relationships, and referral patterns
- Compliance with regulations, laws, and waivers relating to national emergency
- Ability to respond to resurgence
- Infection control and safety protocols



REGULATORY DILIGENCE: PERMITS & ENROLLMENTS

Common Licenses and Enrollments in Governmental Programs

- License to provide services
- Certificate of Need
- CLIA Certificate of Waiver and State License
- DEA Registration and State Registration
- Medicare Provider Agreement
- Enrollment in Medicaid and Medicaid Waiver Programs

- Identify all payors, licenses, and enrollments in governmental programs
- Review information reported to payors, licensing agencies, and governmental programs
- Request information to assess compliance with standards and participation requirements
- Identify notices required to maintain licenses, contracts, and enrollments

REGULATORY DILIGENCE: 36-MONTH RULE

- Rule

- The 36-month rule provides that a HHA's Medicare provider agreement and billing privileges will not transfer following a "change in majority ownership" if such change occurs within 36 months of the date of the HHA's initial enrollment in Medicare or the HHA's most recent change in majority ownership.

- Change in Majority Ownership

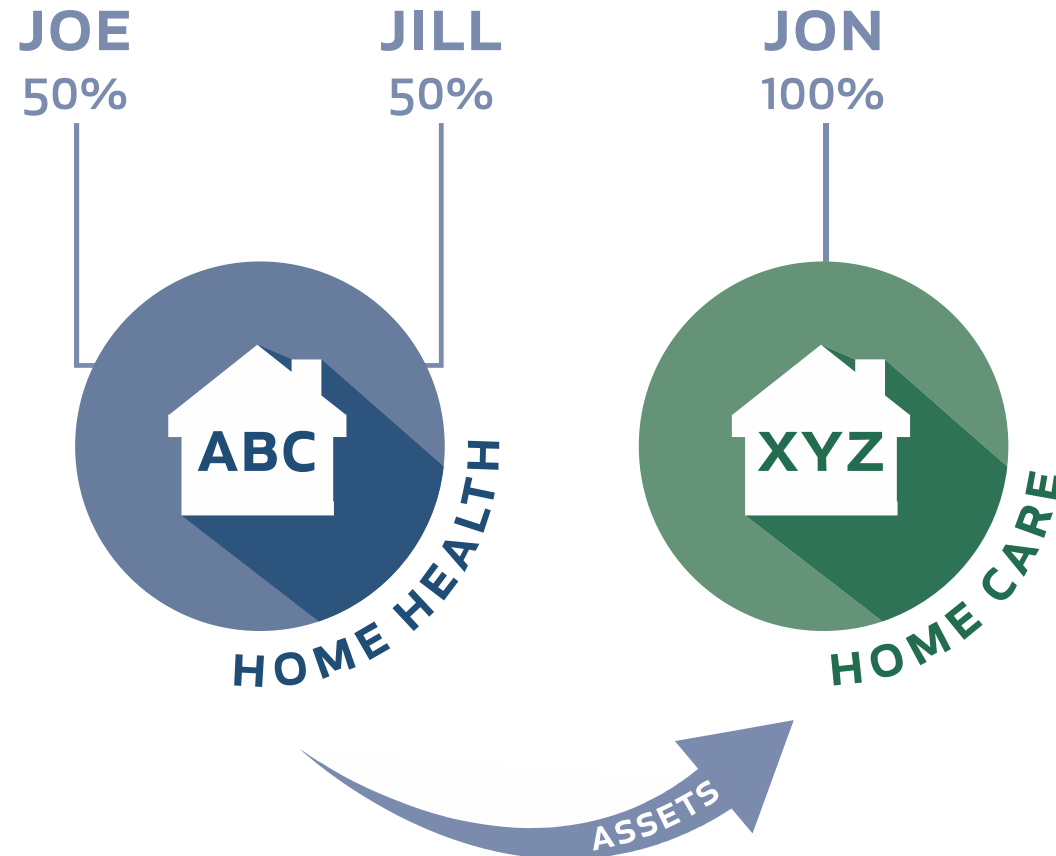
- A change in majority ownership occurs when an individual or organization acquires more than a 50 percent direct ownership interest in an HHA and may result from an asset sale, stock transfer, merger, or consolidation.

Exceptions

- Indirect ownership changes
- "HHA has submitted two consecutive years of full cost reports"
- Internal corporate restructuring of HHA's parent company
- Change in the business structure of the HHA

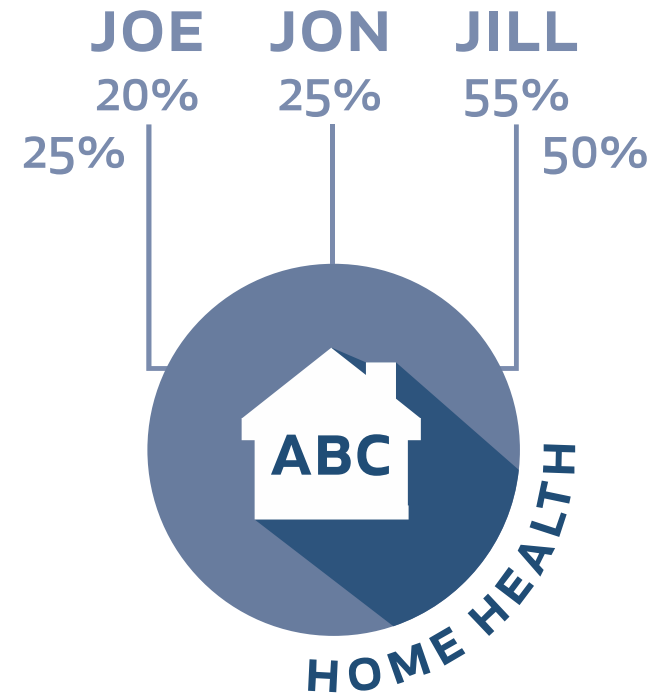
REGULATORY DILIGENCE: 36-MONTH RULE

1/1/2017	Medicare Enrollment
11/1/2018	Anticipated asset sale



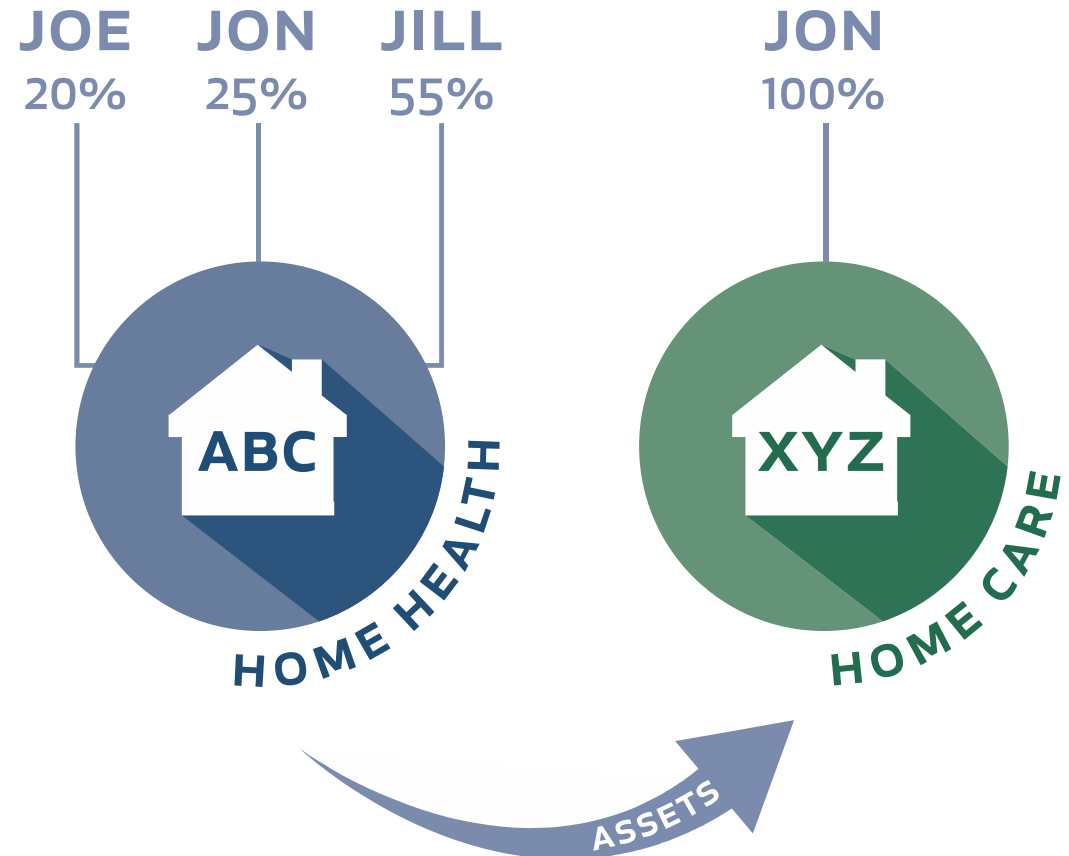
REGULATORY DILIGENCE: 36-MONTH RULE

1/1/2017	Medicare Enrollment
1/1/2020	Joe sells 25% to Jon and 5% to Jill



REGULATORY DILIGENCE: 36-MONTH RULE

1/1/2017	Medicare enrollment
3/1/2018	ABC files full cost report
3/1/2019	ABC files full cost report
1/1/2020	Jill's equity interest increases from 50% to 55%
3/1/2020	ABC files full cost report
6/1/2020	Anticipated asset sale to XYZ Home Care



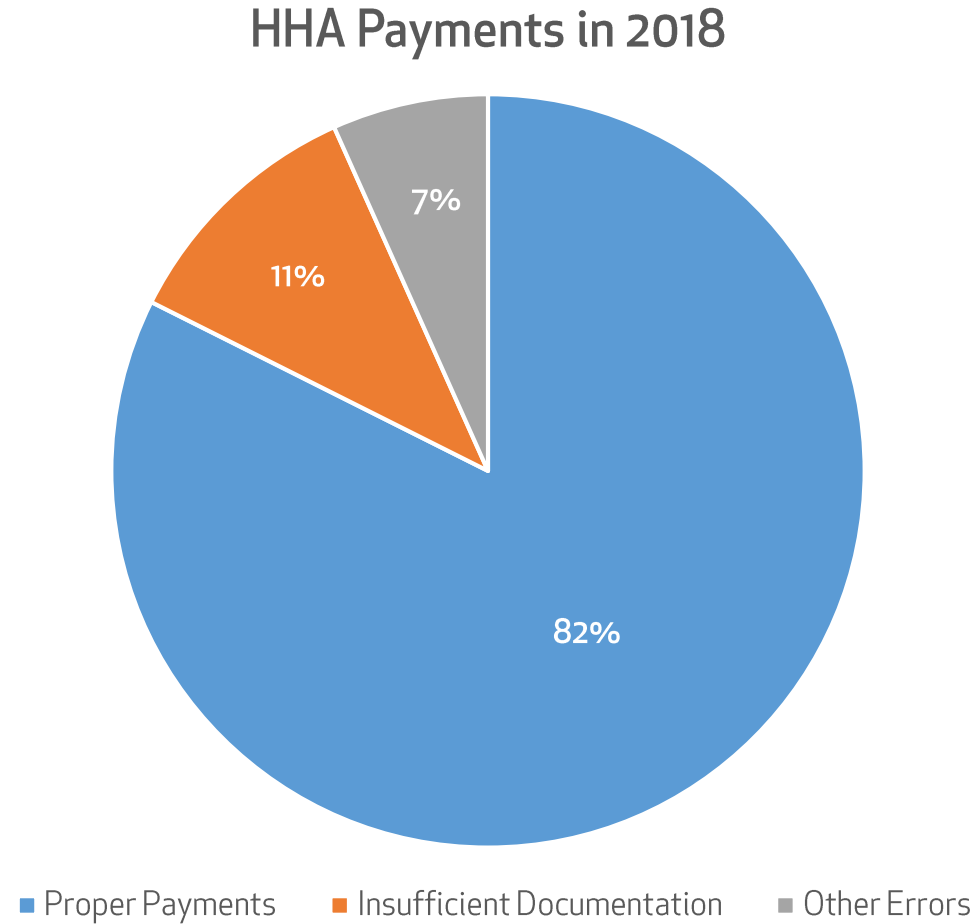
REGULATORY DILIGENCE: AUDITS & RECORDS

- Common Requests
 - Information relating to third-party payor audits
 - Sample of patient records and related claims
 - Information relating to billing practices



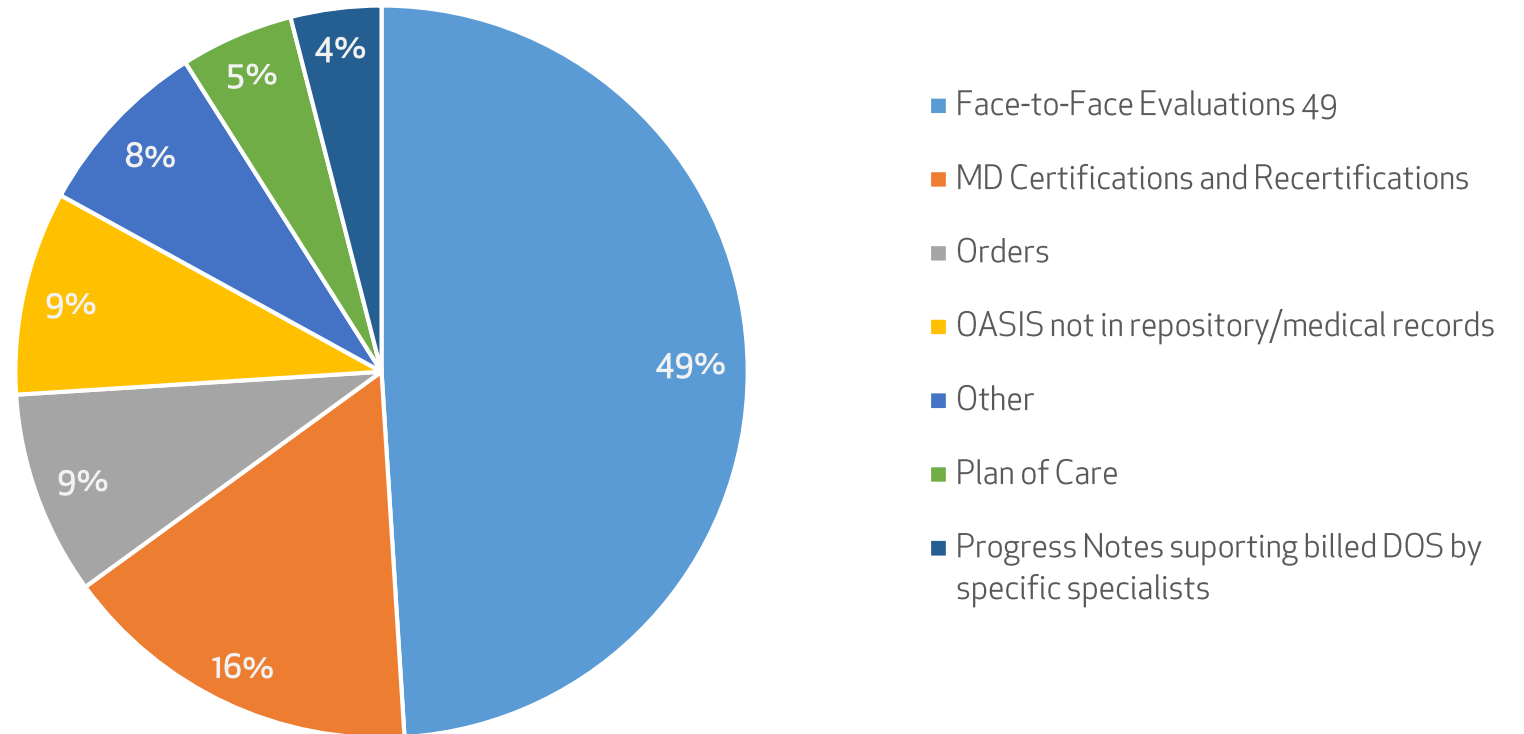
REGULATORY DILIGENCE: AUDITS & RECORDS

GAO estimates that \$3.2 billion (17.9%) of the Medicare payments for home health services were improper in 2018



REGULATORY DILIGENCE: AUDITS & RECORDS

Percentage Breakdown of CERT Error Subcategory for Improper Claims Caused by Insufficient Documentation from FYs 2014 through 2017



Source: HHS OIG, Data Brief: The Centers for Medicare and Medicaid Services Could Use Comprehensive Error Rate Testing Data to Identify High-Risk Home Health Agencies, A-05-17-00035, Aug. 2019

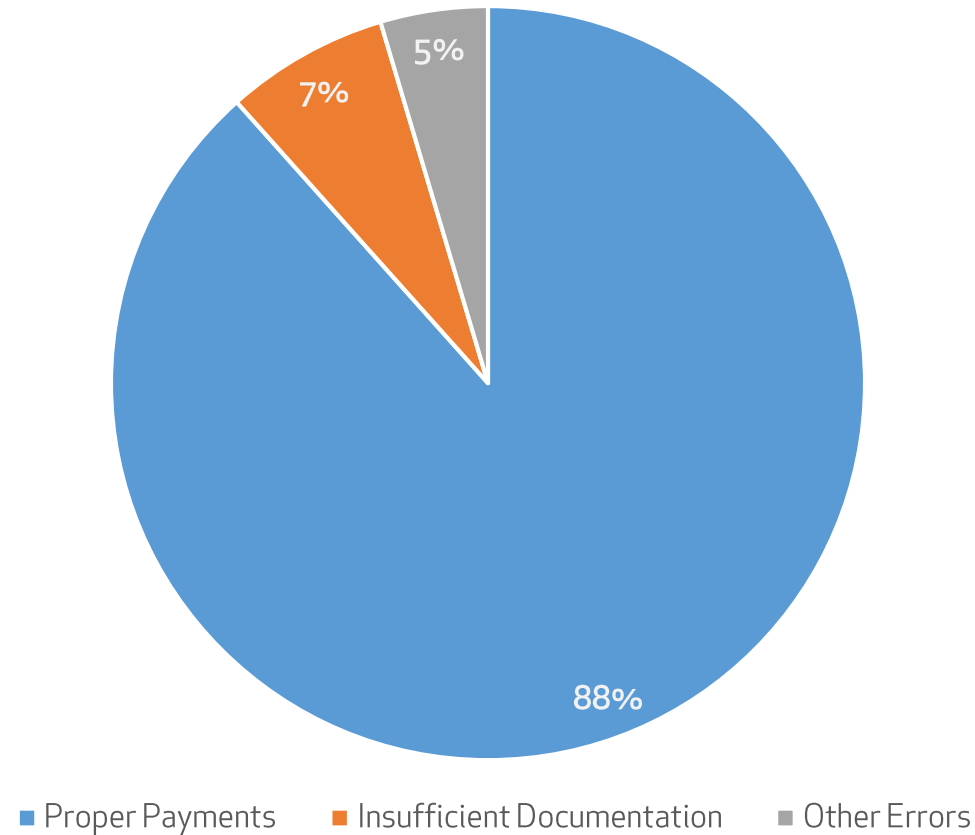
REGULATORY DILIGENCE: AUDITS & RECORDS

GAO estimates that \$2.1 billion (11.7%) of the Medicare payments for hospice services were improper in 2018

Common Issues

1. Incorrect Level of Care
2. Deficient Certification
3. Certification not supported by clinical documentation

Hospice Payments in 2018



REGULATORY DILIGENCE: AUDITS & RECORDS

Characteristics of Providers that could have a High Risk of Improper Billing Practices

Home Health

- High average outlier payment per beneficiary
- High percentage of beneficiaries for whom other HHAs have billed Medicare
- High average number of late episodes per beneficiary
- High average number of therapy visits per beneficiary
- High average number of denials for issues relating to homebound status, certifications, and face-to-face requirements

Hospice

- High number of patients residing in ALFs and NFs
- High rates of discharging patients alive
- High number of patients with long hospice stays
- High percent of beneficiaries with diagnoses that require less complicated care
- Hospices that do not provide all levels of care
- Beneficiaries with high numbers of Part D drugs

REGULATORY DILIGENCE: HOSPICE CAP

- Two Caps
 - Share of inpatient care days is limited to 20% of total Medicare patient care days
 - Total Medicare payments for year exceeds total number of Medicare beneficiaries served multiplied by cap amount (\$29,965) in 2020

REGULATORY DILIGENCE: HOSPICE CAP

Diagnosis	Average Length of Stay
Cancer	53
Neurological Conditions	151
Heart/Circulatory	97
COPD	119
Other	56

Location of Care	Average Length of Stay
Home	93
Nursing Facility	106
Assisted Living Facility	155



REGULATORY DILIGENCE: HIPAA & COMPLIANCE

■ Examples of requests

- Copies of (a) resolution and/or minutes of the Board of Directors of the Company or other similar management body, related to the adoption of the Company's corporate compliance program, (b) minutes and/or other records of compliance committee meetings, (c) corporate ethics and compliance code of conduct; (d) policy and procedure manuals, including policies and procedures related to coding, billing, and contracting, (e) all compliance training materials, including a log of training conducted over the last two years, (f) any compliance risk assessments performed and internal review or compliance audit reports; (g) the log of all matters reported to corporate compliance department and/or chief compliance officer; and (h) any related agreements to such compliance efforts over the past three years (including a log of all calls to the Company's compliance hotline)
- Provide copies of all records relating to internal and external grievances and complaints filed with the companies within the past 24 months
- Listing of compliance officer, compliance committee members and all other compliance personnel, including name, position and compensation (e.g., salary, bonus). Attach a copy of a job description for each position.
- Listing of HIPAA Privacy Officer and HIPAA Security Officer and copies of related job descriptions
- Copies of HIPAA Privacy and Security policies and procedures
- Copy of template Business Associate Agreement and Notice of Privacy Practices
- Copies of last two security risk assessments and risk management plans prepared by the target HHA's in accordance with the HIPAA Security Rule

REGULATORY DILIGENCE: REFERRAL ARRANGEMENTS

- *United States ex rel. Medrano and Lopez v. Diabetic Care Rx LLC, d/b/a Patient Care America, et al.*, No. 15-CV-62617 (S.D. Fla.)
- Key Federal Laws
 - False Claims Act
 - Anti-Kickback Statute
 - Stark Law
- Exceptions and Safe Harbors



REGULATORY DILIGENCE: REFERRAL ARRANGEMENTS

- Common arrangements that should be reviewed
 - Medical Director Agreements
 - Relationships with family members of physicians
 - Leases with referral sources
 - Preferred Provider Agreements
 - Service arrangements with referral sources
 - Historical ownership
 - Marketing practices



DILIGENCE: OPTIONS FOR MANAGING RISK

- Restructure Transaction
- Address all risks pre-closing
- Allocate risks in the purchase agreement and ancillary documents
 - Typically achieved by adjusting scope and survival of disclosures required by the Schedules, representations and warranties, and indemnification obligations



ANATOMY OF PURCHASE AGREEMENT

- Transaction Structure/Purchase Price
- Representations and Warranties
- Covenants
- Indemnification
- Miscellaneous Provisions
- Exhibits (Ancillary Documents)
- Disclosure Schedules



REPS AND WARRANTIES

- Representations are statements or presentations of facts made to induce the other party to act
- Warranties are stipulations that certain facts, in relation to the subject of the contract, either are true or will continue to be as stated or promised in the purchase agreement
- These are the first steps in allocating risk in a transaction



REPS AND WARRANTIES INVOLVING HEALTHCARE ISSUES

- Licenses, permits and accreditation
- Consents and governmental approvals
- Compliance with laws
- Billing practices
- Contracts and commitments
- Litigation and compliance



INDEMNIFICATION

- Risk is inherent in each transaction
- Buyers always have more exposure due to the information imbalance
- No matter how thorough diligence is, certain issues do not manifest themselves until after the transaction has closed
- Indemnification is the mechanism for allocating the risk — it provides for compensation in the event of specific harms or losses



CLOSING

- Regulatory documents and issues aside, closings can typically be done electronically by exchanging each party's signatures
- If this is done, make sure the documents allow execution by counterparts and electronic signatures
- The transaction is not "closed" until (i) all signatures have been released (exchanged) and (ii) the cash payable to Seller at closing is received

TRANSITION SERVICES AGREEMENT

- Allows the parties to coordinate a smooth and successful transition in an effort to minimize interruptions to patients
- Typically, the Seller agrees to assist the Buyer with specific services for a limited time post-closing
- Sellers are typically compensated, but the payment terms must be reviewed by a health care attorney to avoid kickback issues



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TIPS FOR PREPARING FOR A SALE

Corporate Documents; Financial Statements; Broker;
Regulatory Documents and File; Corporate File

PREPARING FOR A SALE: CORPORATE DOCUMENTS

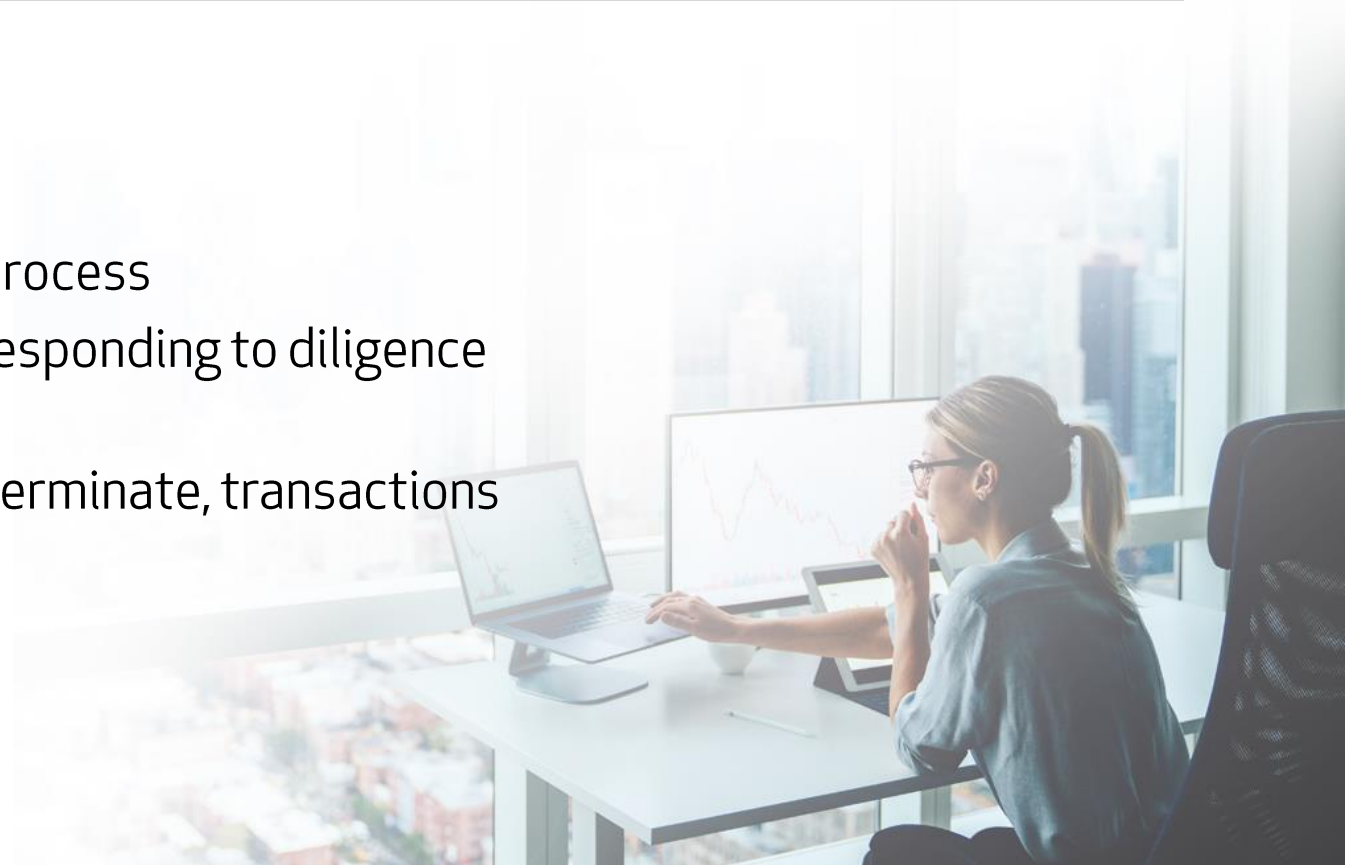
- Make sure the entity has up to date meeting minutes naming officers, directors, and/or managers with current terms
- Update stock books and equity ledgers
- Collect and account for all original equity certificates
- Determine whether transaction requires any amendments to formation or governing documents

PREPARING FOR A SALE: FINANCIAL STATEMENTS

- Determine whether the company's financial statements are prepared in accordance with GAAP
- Audited financial statements are preferred, but unaudited versions should also be acceptable
- Make sure the financials provided are aligned with tax filings
- Enlist the help of a CPA

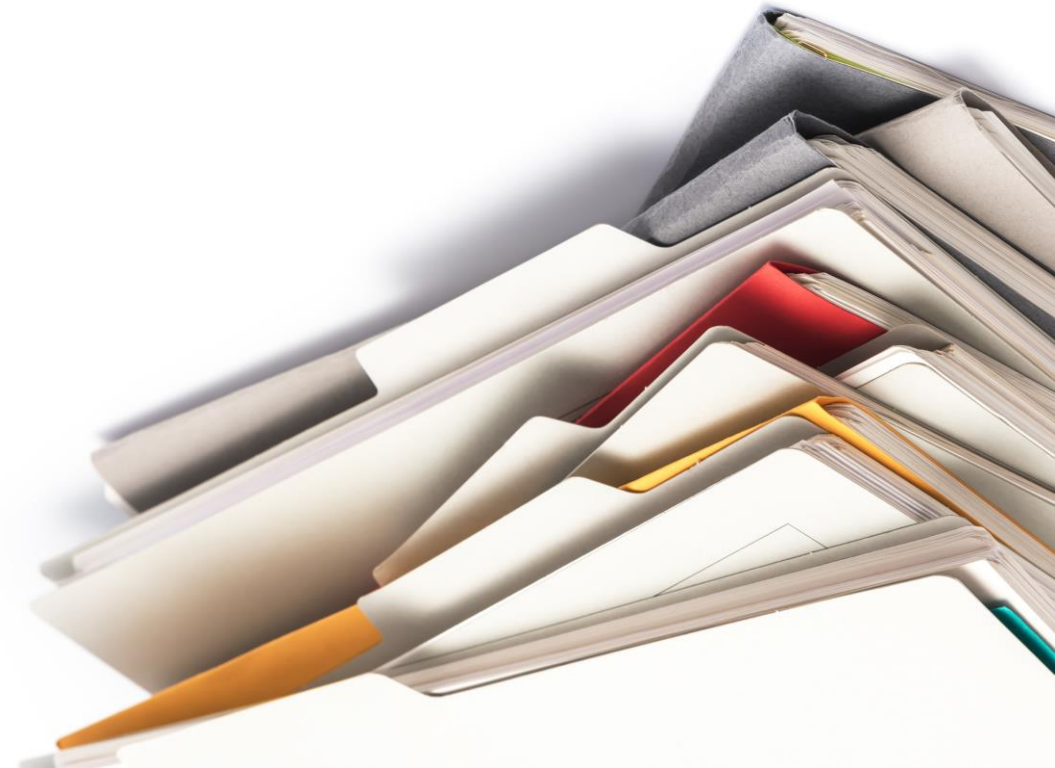
PREPARING FOR A SALE: FINANCIAL STATEMENTS

- Brokers can:
 - Connect parties willing to buy and sell
 - Navigate the LOI/Term Sheet negotiation process
 - Assist with collecting diligence items and responding to diligence requests
 - Help resolve core issues that can delay, or terminate, transactions



EXAMPLE OF DOCUMENTS IN CORPORATE FILE

- Contracts
- Meeting Minutes
- Certificates of Good Standing
- Capitalization Table
- Organization and Governing Documents



PREPARING FOR SALE: REGULATORY DOCUMENTS

- Update information on file with regulatory agencies
 - PECOS
 - NPPES
 - Information on file with state licensing agencies and Medicaid
- Prepare file of commonly requested diligence items
 - Licenses
 - Revalidation and/or Medicare Approved Enrollment Record (PECOS)
 - Compliance and HIPAA policies and procedures
 - Payor contracts
 - Spreadsheet tracking audits
 - Medical Director Agreements, invoices, and payment records



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TIPS FOR BUYERS

Risk Mitigation; Structure of Purchasing Entity;
Diligence; Integration Plan

TIPS FOR BUYERS

- Conduct comprehensive regulatory due diligence
- Commence preparation of integration plan early in the process



RISK MITIGATION TIPS FOR BUYERS

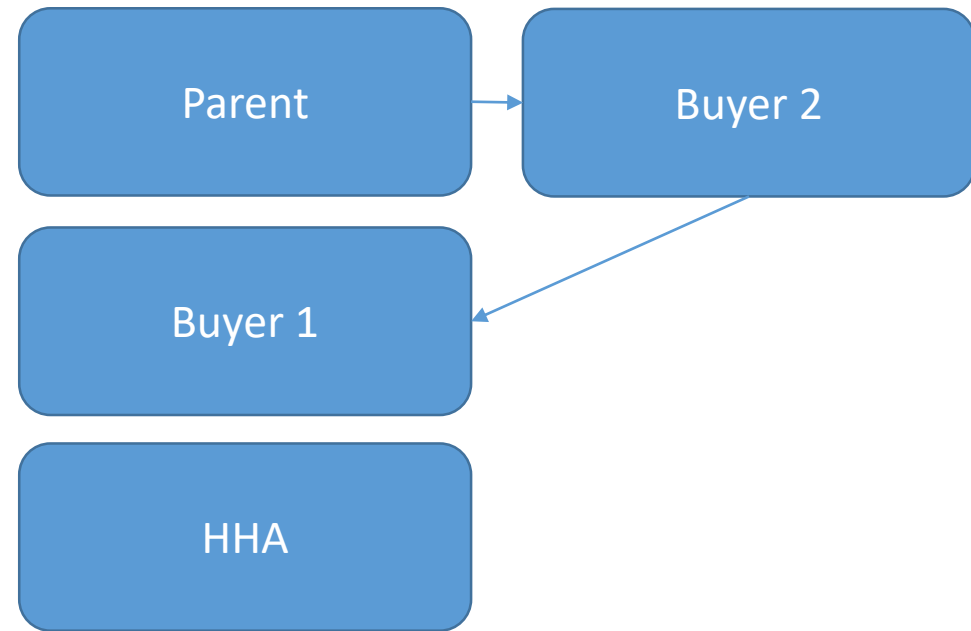
- Baskets as opposed to deductibles
- Remove or reduce the number of knowledge qualifiers
 - If knowledge qualifiers exist, define to include “due inquiry”
- Remove or reduce the number of materiality qualifiers
- Try to extend survival of representations and warranties
 - Create carveouts for fraud and “fundamental representations”
- “Catch all” representation
- Representation and warranty insurance
- Escrow or Holdbacks



Axel R-D 2016

TRANSACTION STRUCTURE

- Buyers can structure the transaction to avoid 36-month rule violations
- A Buyer can form a holding company (at the parent level) prior to acquiring a home health agency
- In the example, Buyer 2 can purchase the equity of Buyer 1 from Parent without triggering a subsequent 36-month rule





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QUESTIONS?



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THANK YOU!

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