

2022

L. EDWARD BRYANT, JR.  
NATIONAL HEALTH LAW  
TRANSACTIONAL COMPETITION

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OFFICIAL PROBLEM

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## **A. Introduction**

Your firm represents a client, Virtual Wellness, Inc. (“VW”) which is a leading provider of virtual healthcare services. It provides access to high-quality care and expertise, with a portfolio of services and solutions covering a vast array of sub-specialties, from non-urgent medical needs like upper respiratory infections to chronic complicated medical conditions, like cancer and congestive heart failure.

Because the services are virtual, VW can deliver services on a business-to-business basis to countries around the world. VW has a variety of private practitioners working for it on a contract basis. It enters into provider agreements with those providers. It also employs physicians and other allied health professionals on a full-time basis so it can be medically responsive to its patients. VW accepts medical insurance from all the major health care insurers, as well as government programs like Medicare and Medicaid. It is one of the top three virtual healthcare service providers in the U.S.

To its knowledge, VW is not currently under investigation for any violations of the Anti-Kickback Statute (42 U.S.C. Sec. 1320a-7(b)), the civil False Claims Act (31 U.S.C. Sec. 3729 et seq.), the administrative False Claims Law (42 U.S.C. Sec. 1320a-7(b)(a)), the Civil Monetary Penalties Law (42 U.S.C. Sec. 1320a-7b(a)), the exclusion laws (42 U.S.C. Sec. 1320a-7) and/or the Medicare and Medicaid statutes (Title XVIII and Title XIX of the Social Security Act). VW’s policies and procedures are currently compliant the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and its related Rules and Regulations for privacy and security, as well as the data protection rules provided in the General Data Protection Regulation (“the GDPR”) for patients it serves in countries governed by the GDPR. VW’s physicians and allied health professionals comply with state licensure laws and telemedicine interstate compacts within the U.S.

VW’s principal executive offices are located in the city of Pearson, State of Loyola. VW is a public company listed on the New York Stock Exchange (“NYSE”) and is registered under the Securities Act of 1933 with the United States Securities and Exchange Commission (the “SEC”). It is organized under the laws of the State of Delaware.

VW has contacted your firm to advise it about a potential merger with another public company, High Tech Health, Inc (“HTH”). HTH is a digital health management company that has created a unified digital platform that allows patients to use their cellular-connected devices to manage chronic health conditions like diabetes, heart disease, arthritis, and cancer. HTH’s digital platform connects patients with coaching, data science-enabled insights, and health tracking tools that collect data that the patients can share with medical providers if they choose to. Patients can purchase the HTH platform on their own and pay an annual fee for access to all its services. HTH also contracts with several large employers who provide the platform to employees as part of their health and wellness programs. While there are several companies providing similar services on the market, HTH is known for its high member satisfaction; it has proven measurable, sustainable health outcomes; and it has shown to be cost-effective for its users.

HTH’s general counsel has previously advised the company that it is not subject to the regulatory requirements of HIPAA, and is unlikely to be subject to the FDA’s regulatory authority. Because it does not currently facilitate payments through Medicare and Medicaid, its services do not implicate federal health regulations.

HTH is listed on the NYSE and registered with the SEC. HTH has its principal executive offices in the city of Ignatius, State of Loyola. It is organized under the laws of the State of Delaware.

VW has been wooing HTH to merge on the basis that the merger would represent one of the largest deals in the health care sector at a time when demand for virtual care is soaring as a result of the Covid-19 pandemic. If the merger is successful, it would create a digital health behemoth that would combine one of the largest virtual healthcare companies with a virtual platform for managing chronic conditions. VW plans to expand the

HTH platform so that virtual providers can use it directly, integrating the data-tracking features with patients' electronic medical records, and facilitating access to prescriptions and medical supplies. The combined company would be called Virtual Wellness Health, Inc. ("VWH"). You have been advised that the Board may ask if there are antitrust implications because of the size of the market share of the combined company. You understand that there are laws and rules regulating mergers and acquisitions, one of which is Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvement Act of 1976. You also know that the Federal Trade Commission, ("FTC") offers guidance. The Board is likely to ask if VW must provide notice of the merger to the FTC.

Your Senior Partner acts as General Counsel to VW. She has asked you to look into the antitrust implications noted above and to do due diligence on VW, which includes a check to see if it has any undisclosed sanctions by a federal health care program before your firm began serving as its counsel. She has also asked you to run a general litigation search on HTH and to review the publicly available information on its financial health, like its annual reports and credit ratings. You understand that each company will provide selected historical consolidated financial data. You also understand that each party will have tax counsel. VW's tax counsel will provide your team with the necessary opinions together with financial reports and audits it has reviewed and opined on from VW's accounting department.

## **B. Proposed Terms of the Merger**

The Boards of the companies have been negotiating about stock ownership of the combined company. If approved by the shareholders of each company, each HTH share will be exchanged for a percentage share of VW and possibly additional cash consideration. The share issuance proposal contemplates that existing VW shareholders will own about 58% of the combined entity, with existing HTH shareholders owning the remaining 42%. Based on recent share prices, it is estimated that the valuation of VWH after the merger will be in the \$30 million to \$32 million range.

Neither company currently pays dividends. Prior to the effective date of the merger, HTH will pay a cash dividend per share of HTH common stock equal to \$3.03, referred to as a special dividend per share amount. As part of the merger, all shares of HTH common stock will be converted into shares of VW common stock.

After the merger, each company will file Form 8937, where required, with the Department of the Treasury, which is a report of organizational actions affecting basis of securities. You have been told by VW's outside tax counsel that for U.S. federal income tax purposes, the merger is intended to be treated as a "reorganization" within the meaning of Section 368(a) of the Internal Revenue Code. It is a condition of completion of the merger that HTH will secure an opinion from its counsel that the merger will qualify as a reorganization within the meaning of Section 368(a). Neither company intends to request a ruling from the IRS as to the U.S. federal income tax consequences of the merger.

If the companies proceed with the merger, the team of attorneys will collaboratively agree upon on the terms and conditions of the merger and draft the Joint Agreement and Plan of Merger.

## **C. Board Meeting and Client Deliverables**

VW's Board will be holding a special meeting to consider the proposed merger. The board has asked your legal team to give a presentation outlining the risks and benefits of the merger as it considers whether to recommend the merger to its shareholders. Specific issues to be addressed are as follows:

1. A discussion of any corporate and tax law issues raised by the proposed merger; any impediments to negotiating or closing the transaction raised by these issues; and your recommendations regarding issue resolution.
2. A discussion of the legal and regulatory issues raised by the proposed merger of a virtual healthcare services provider that is currently subject to federal and state health care regulations, and a digital technology company that has not faced scrutiny by health care regulators; any impediments to negotiating or closing the transaction raised by these issues; and your recommendations regarding issue resolution.
3. A discussion of the business and strategic issues that Board should consider when making their recommendation.
4. An explanation of process for approval of the proposed merger, and a brief description of the documents that your team of attorneys (in collaboration with opposing counsel) will need to draft in advance of the Special Meeting of Shareholders to vote on the merger.

You have been asked to prepare a memorandum addressing the above issues. Please limit your written response to 25 double-spaced pages.



# TRANSACTIONAL MEMORANDUM

02/13/2022

**Prepared For :**

Virtual Wellness, Inc.  
Board of Directors

**Team 11, LLP**

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## **I. Executive Summary**

Our firm recommends a merger between Virtual Wellness, Inc. (“VW”) and High Tech Health, Inc. (“HTH”) to form Virtual Wellness Health, Inc. (“VWH”). As HTH is a reputable and successful digital health management company, this merger presents the most efficient way for VW to break into the growing digital health management field. Digital health data will likely continue to soar in the post-COVID 19 era, and this merger would be an essential step for VW to stay relevant in this competitive market. HTH’s cutting edge health data tracking features would perfectly complement VW’s industry-leading virtual health care services. Patients and providers alike would benefit from a seamlessly integrated virtual platform provided by this new, trailblazing company: VWH. Our firm can assist VW with navigating through the various corporate, tax, legal, and business and strategic considerations implicated by this merger.

First, our firm proposes that VW pursue a Type A reorganization with HTH to create VWH, as this reorganization category offers the most flexibility in consideration options under Section 368(a) of the Internal Revenue Code (“IRC”). Our firm will ensure compliance with all federal and Delaware corporate and tax laws, particularly the IRC’s reorganization requirements. Additionally, we will structure and negotiate this reorganization through a method that best achieves VW’s goals. With the information we currently possess, a triangular merger will likely offer the most benefits to VW, considering it will shield VW from HTH’s liabilities.

Second, a merger between VW and HTH would pose several legal and regulatory issues. For instance, as demand for mobile health services continues to rise, many of the legal and regulatory issues facing VW relate to maintaining patient privacy throughout and after the

merger.<sup>1</sup> To maintain Medicare and Medicaid eligibility and regulatory compliance, our firm can help maneuver through these legal issues throughout the course of the transaction.

Finally, our firm can lead all parties through the business and strategic considerations required for the merger, such as VWH's mission, culture, and branding, as well the process for approval and documents necessary to effectuate the merger.

## **II. Corporate and Tax Law Considerations**

The parties should consider several corporate and tax law issues implicated by the proposed merger. While some of these issues may raise potential hurdles to negotiating or closing the transaction, our firm offers recommendations regarding issue resolution.

### **A. Reorganization Under IRC § 368**

To ensure tax-deferred status as a "reorganization" under Section 368(a) of the IRC, the parties must satisfy certain requirements and select a transaction structure.<sup>2</sup> Under Section 368(a), merger and acquisition transactions qualify as a reorganization when the acquirer (VW) gives a significant amount of its own stock as consideration to the acquired (HTH).<sup>3</sup> The gains and/or losses realized on the transaction will be tax deferred; however, if HTH shareholders receive "boot,"<sup>4</sup> HTH shareholders will be taxed on the receipt of that boot as either capital gains or a dividend.<sup>5</sup> Our firm will ensure compliance with the reorganization requirements and help select a transaction structure to best achieve VW's goals.

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<sup>1</sup> See Ryan Haines, *Mobile Health Apps Today*, APPIT (Nov. 25, 2020), <https://appitventures.com/blog/mobile-health-apps-and-hipaa-compliance>.

<sup>2</sup> See I.R.C. § 368; *Tax-Free Reorganizations: Acquisitive Reorganizations*, THOMSON REUTERS PRACTICAL LAW, [https://1.next.westlaw.com/Document/I1559f72ceef211e28578f7ccc38dcbee/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=cf3d004acdc946169a6311b6265e0064&contextData=\(sc.Default\)](https://1.next.westlaw.com/Document/I1559f72ceef211e28578f7ccc38dcbee/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=cf3d004acdc946169a6311b6265e0064&contextData=(sc.Default)).

<sup>3</sup> *Id.*

<sup>4</sup> Boot is any form of consideration other than VW's stock, such as cash or debt. *Id.*

<sup>5</sup> See I.R.C. § 356(a)(2); *Tax-Free Reorganizations: Acquisitive Reorganizations*, *supra* note 2.



Section 368(a)(1) recognizes various types of reorganizations including, among others, (1) Type A (statutory merger or consolidation), (2) Type B (stock-for-stock acquisition), and (3) Type C (stock-for-assets acquisition).<sup>6</sup> Our firm recommends that VW undertake a Type A reorganization because under Type A, the form of consideration is flexible; common or preferred stock, voting or non-voting stock, and cash are all permitted.<sup>7</sup> Under a Type A reorganization, we must comply with certain conditions and Delaware's merger and acquisition laws.

### **1. Reorganization Requirements**

The following statutory and judicial conditions must be satisfied to qualify as a Type A reorganization: (1) continuity of ownership interest; (2) continuity of business enterprise; (3) valid business purpose; and (4) the step transaction doctrine.<sup>8</sup> Under the continuity of ownership interest condition, at least 40 percent of the consideration received by HTH shareholders must be in the form of VW stock.<sup>9</sup> To satisfy the continuity of business enterprise condition, VW must either continue HTH's historical business or use a significant portion of HTH's assets in an existing business for at least two years following the transaction.<sup>10</sup> The valid business purpose condition requires that the transaction serve a purpose beyond simply avoiding taxes.<sup>11</sup> Our firm will help create the necessary plan of reorganization that defines the scope of the transaction.<sup>12</sup> Finally, under the step transaction doctrine condition, the transaction cannot be part of a larger plan that would constitute a taxable acquisition taken in its entirety; every action in the

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<sup>6</sup> I.R.C. § 368(a)(1).

<sup>7</sup> See I.R.C. § 368(a)(1)(A); *IRC 368 Tax Free Reorganization*, MCGUIRE LAW FIRM, <https://jmtaxlaw.com/irc-338-tax-free-reorganization/>.

<sup>8</sup> See *Sec. 368 Reorganization Taxation*, MACKAY, CASWELL & CALLAHAN TAX AND BUSINESS ATTORNEYS (Feb. 20, 2018), <https://www.mcc4tax.com/the-tax-treatment-of-a-sec-368-reorganization/#:~:text=Four%20Conditions%20of%20a%20368%20Reorganization&text=These%20conditions%20are%20continuity%20of,and%20the%20step%20transaction%20doctrine.>

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See I.R.C. §§ 354(a), 361(a).

transaction must have an independent economic motive.<sup>13</sup> Our firm will make sure the merger complies with these four conditions to maintain tax-exempt status.

## 2. Reorganization Structures

Our firm can help VW determine which structure of Type A reorganization to pursue and negotiate based on VW's goals. The four structures include a statutory consolidation, statutory merger, reverse triangular merger, and forward triangular merger. Each structure presents benefits and downsides, and we will need to gather more information from the Board regarding VW's goals of the deal to help formulate a plan moving forward. For instance, we will need to determine whether VW and/or HTH plan to dissolve after the merger, whether HTH has any significant liabilities, and any change of control provisions in HTH's agreements with its clients.

In a statutory consolidation, VW and HTH, as two equally grounded companies, would contribute all of their assets and liabilities to a new corporation (VWH), and VW and HTH would dissolve.<sup>14</sup> VW and HTH shareholders would have the same voting and appraisal rights as in a statutory merger.<sup>15</sup> This structure would be appropriate if HTH and VW aspired to merge as equals and start fresh with a new company, VWH. Some drawbacks to statutory consolidations and mergers are that VW would assume all of HTH's liabilities and dissenting shareholders could demand that their shares be appraised and purchased.<sup>16</sup> Thus, we would need to investigate HTH's liabilities to determine whether it is in VW's best interest to acquire them. Additionally, a potential downside to this structure is that it would require significant efforts to form VWH as a new public corporation. If this is the route VW decides to pursue, our firm can assist by drafting new Articles of Incorporation and issuing new shares through an initial public offering.

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<sup>13</sup> See *Commissioner v. Clark*, 489 U.S. 726, 738 (1989); *Sec. 368 Reorganization Taxation*, *supra* note 8.

<sup>14</sup> See *Tax-Free Reorganizations: Acquisitive Reorganizations*, *supra* note 2.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

In a statutory merger, VW would absorb HTH, and then VW could rename its entity to VWH or create a VWH as a new subsidiary.<sup>17</sup> HTH shareholders would exchange their shares for VW stock and up to 60 percent boot (continuity of interest requirement applies).<sup>18</sup> HTH would be liquidated, and VW would assume all of its assets and liabilities.<sup>19</sup> Under Delaware law, approval of the merger plan would likely be subject to VW and HTH shareholder votes.<sup>20</sup> Similar to a statutory consolidation, a statutory merger presents some disadvantages such as assumption of HTH's liabilities and possible dissenting shareholders.<sup>21</sup> A statutory merger may be a more efficient and economical option for the parties because this would not require forming a new public corporation or issuing new stock.

In a reverse triangular merger, VW would form a new wholly owned subsidiary (VWH), which would merge with HTH, with HTH surviving as a wholly owned subsidiary of VW.<sup>22</sup> Under this arrangement, HTH would retain all of its assets and liabilities, which would shield VW from assuming HTH's liabilities.<sup>23</sup> Additionally, HTH would still keep its leases, contracts, and licenses that VW could use by going through a traditional merger.<sup>24</sup> However, this structure may not be preferable for VW because HTH would still exist. If the goal of the merger is to create VWH as a new entity through which the parties operate, then the reverse triangular merger may not present the best option for this deal.

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<sup>17</sup> See Jeffrey L. Kwall, *THE FEDERAL INCOME TAXATION OF CORPORATIONS, PARTNERSHIPS, LIMITED LIABILITY COMPANIES, AND THEIR OWNERS*, 655-56 (6th ed. 2019); I.R.C. § 368(a)(2)(C) (permitting acquisition by a parent followed by a "drop down").

<sup>18</sup> See *Tax-Free Reorganizations: Acquisitive Reorganizations*, *supra* note 2.

<sup>19</sup> *Id.*

<sup>20</sup> See Del. Code tit. 8 § 251(c).

<sup>21</sup> See *Tax-Free Reorganizations: Acquisitive Reorganizations*, *supra* note 2.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

Alternatively, in a forward triangular merger, VW would form a new subsidiary (VWH), and merge VWH with HTH.<sup>25</sup> After merging, HTH's assets and liabilities would become those of VWH, which would remain wholly owned by VW.<sup>26</sup> HTH would receive parent VW stock and dissolve, and VWH would be left as the remaining entity.<sup>27</sup> This structure is important if VW owns other assets that it does not want to expose to HTH's liabilities.<sup>28</sup> By utilizing VW stock as consideration, VW could retain 100 percent ownership of VWH as the subsidiary.<sup>29</sup> This structure is beneficial if VW wishes to still exist and HTH is willing to dissolve. However, this structure may be difficult to execute if HTH expects more equal footing in the deal.

Based on the information we currently have, a triangular merger is likely the best option for VW because it would shield VW from HTH's liabilities and still allow the parties to jointly operate VWH as a subsidiary of VW.

### **B. One-Step or Two-Step Merger**

Next, the parties must choose whether to pursue a one-step or a two-step merger. In a one-step merger, VW and HTH would need to negotiate a definitive merger agreement, approve the merger agreement by HTH's board of directors, and adopt the merger agreement by holders of HTH's outstanding stock.<sup>30</sup> Under Delaware law, the shareholder vote requires approval of a majority of HTH's outstanding shares, unless HTH's organizational documents require a greater vote or if HTH has multiple classes of stock outstanding.<sup>31</sup> The one-step merger requires more extensive approval and waiting periods (discussed below in sections III.E. and V.).

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See Kwall, *supra* note 17 at 650.

<sup>29</sup> *Id.* at 651.

<sup>30</sup> Thomas W. Christopher, et al., *Acquiring a US Public Company*, LATHAM & WATKINS LLP, <https://www.lw.com/thoughtLeadership/acquiring-US-public-company-overview-acquirer>.

<sup>31</sup> *Id.*

In a two-step structure, VW would initiate a tender or exchange offer for any and all outstanding shares of HTH's common stock, followed by a "back end" or "squeeze out" merger.<sup>32</sup> If VW acquires 90 percent of HTH's outstanding shares in the offer, the acquisition can quickly be effectuated through a short-form merger without a stockholder vote under Section 253 of the Delaware General Corporation Law.<sup>33</sup> While a two-step merger may be preferable to expedite the deal, our firm recommends pursuing a one-step merger because VW is offering stock as consideration and the health care industry is highly regulated.<sup>34</sup>

### **C. Other Corporate Law Considerations**

The parties should also be aware of other potential corporate law issues triggered by this transaction. Most importantly, because both VW and HTH are incorporated in Delaware, we will need to comply with the Delaware General Corporate Law regarding mergers and acquisitions. Additionally, the Board must keep in mind the fiduciary duties owed to VW and its shareholders. Under Delaware law, directors owe the basic fiduciary duties of care and loyalty, including good faith, oversight, and disclosure.<sup>35</sup> As such, it is imperative that the Board stays well-advised throughout the transaction, acts in the best interests of VW and its shareholders, and maintains confidential information.

Furthermore, both VW and HTH should be mindful of insider trading and short-swing trading laws and comply with the Securities and Exchange Commission's ("SEC") governing rules.<sup>36</sup> The parties should also be aware of potential shareholder litigation, also referred to as

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*; see also Del. Code tit. 8 § 251(h) (expedites friendly acquisitions by eliminating the need for a stockholder vote on a second-step merger following consummation of a tender or exchange offer for a publicly listed Delaware corporation).

<sup>34</sup> See Christopher, et al., *supra* note 30.

<sup>35</sup> See Marc S. Gerber, et al., *Directors' Fiduciary Duties: Back to Delaware Law Basics*, SKADDEN (Feb. 19, 2020), <https://www.skadden.com/insights/publications/2020/02/directors-fiduciary-duties>. Under the business judgment rule, courts defer to the directors' business decisions as long as the directors were well-informed.

<sup>36</sup> See C.F.R. §§ 240.10b5-1, 240.10b5-2; 15 U.S.C. § 78p. This is discussed in more detail in Section III.E. below.

“merger strike suits.”<sup>37</sup> Such lawsuits often allege flaws in the sale process and/or the disclosure regarding the transaction contained in the principal SEC disclosure document.<sup>38</sup> Finally, VW should keep in mind that federal laws, Delaware laws, and HTH’s organizational documents may limit the number of shares VW can purchase, or require certain approvals or clearances in connection with the share purchases.<sup>39</sup> Our firm will help navigate any such corporate issues throughout the course of the transaction.

#### **D. Other Tax Law Considerations**

The parties should also be aware of potential tax law issues raised by this transaction, through which we will work with tax counsel to traverse. At the outset, we should undergo tax due diligence to confirm important information about HTH, including contracts, pending and potential lawsuits, customers, compensation agreements, and more. Within 45 days of the merger, each company must file Form 8937 with the Department of the Treasury to report organizational actions affecting the basis of securities.<sup>40</sup> Each corporate party should also be sure to file a statement with its tax return for the year in which the reorganization occurred.<sup>41</sup> Additionally, because HTH plans to pay a special dividend before the merger, its shareholders will have to pay income tax on the dividend.<sup>42</sup>

As part of our tax due diligence, we should determine whether HTH has taken out any Paycheck Protection Program loans under the Coronavirus Aid, Relief, and Economic Security

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<sup>37</sup> See David McKinley, *Federal Courts Turn Away Delaware’s Redirected Merger Suits*, COLUMBIA BUSINESS LAW REVIEW (Jan. 7, 2020), <https://journals.library.columbia.edu/index.php/CBLR/announcement/view/258>.

<sup>38</sup> *Id.*

<sup>39</sup> See Del. Code tit. 8 § 201.

<sup>40</sup> *Instructions for Form 8939*, IRS (Dec. 2017), <https://www.irs.gov/instructions/i8937#:~:text=Form%208937%20must%20be%20filed,effect%20on%20basis%20is%20determinable>.

<sup>41</sup> 26 C.F.R. § 1.368-3.

<sup>42</sup> See *Topic No. 404 Dividends*, IRS (Feb. 4, 2022), <https://www.irs.gov/taxtopics/tc404>.

(“CARES”) Act.<sup>43</sup> If so, we will need to review the associated risks, including whether the loan was properly acquired and whether HTH has complied with the loan covenants.<sup>44</sup> We should also investigate other liabilities arising from HTH potentially benefitting from the CARES Act, such as the deferral of payroll taxes and net operating loss adjustments.<sup>45</sup> This potential liability could influence how VW wants to structure the deal and could increase VW’s negotiation leverage.

Moreover, the parties should ensure that VWH’s health care professionals, particularly physicians, are properly classified as 1099 independent contractors or W2 employees.<sup>46</sup> Inappropriate classification of employees as independent contractors can trigger potential tax, regulatory, and employee benefit liability and impact whether coverage applies under a malpractice insurance policy. This will be important, as VW has private practitioners working on for it on a contract basis and also employs physicians and other allied health professionals. Our firm will partner with tax counsel to help maneuver all tax issues triggered by the merger.

In sum, our firm recommends that VW pursue a Type A reorganization through a one-step merger. We will need to gather more information concerning the parties’ goals of the deal to best help VW select and negotiate a reorganization structure, but based on the information available to us at this time, it seems a triangular merger is the most optimal. Additionally, our firm will assist VW in ensuring that all reorganization requirements under Section 368(a) and other corporate and tax law issues are complied with throughout this transaction.

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<sup>43</sup> See Brett M. Crowell, *Mergers and Acquisitions During the COVID-19 Pandemic*, THE TAX ADVISOR (Aug. 1, 2020), <https://www.thetaxadviser.com/issues/2020/aug/mergers-acquisitions-covid-19-pandemic.html>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Kevin S. Little, *Medical Practices Beware Risks that Attend Improper Classification of Contracted Physicians*, HAMIL LITTLE HEALTHCARE LAW (Mar. 20, 2017), <https://www.totalhealthlaw.com/medical-practices-beware-risks-attend-improper-classification-contracted-physicians/>.

### **III. Legal and Regulatory Considerations**

The Board must also consider various legal and regulatory issues implicated by this merger. At the outset, it will be imperative for the parties to undergo extensive due diligence to investigate any potential regulatory liability to ensure compliance is met on all angles.

Consequently, this may present impediments to negotiations.

#### **A. Federal Fraud and Abuse Laws**

In recent years, the federal government has recouped billions of dollars through the enforcement of fraud and abuse laws, which govern monetary arrangements between providers and federal health care programs. The Social Security Act created both Medicare and Medicaid and authorizes the Office of the Inspector General (“OIG”) to impose civil and criminal penalties on those who attempt to commit fraud against the federal government.<sup>47</sup> This merger may trigger federal fraud and abuse liability if VWH accepts Medicare and Medicaid patients.

The Stark Law and Anti-Kickback Statute (“AKS”) are the primary federal statutes that concern improper physician referrals. The AKS prohibits the exchange of remuneration<sup>48</sup> for referrals for services payable by a federal program unless a “safe harbor”<sup>49</sup> applies.<sup>50</sup> AKS violations can result in significant criminal and civil liability and exclusion from federal programs.<sup>51</sup> Although the AKS does not provide a private right of action for civil enforcement, private individuals can bring qui tam actions under the False Claims Act (“FCA”) for

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<sup>47</sup> See Jennifer STAMAN, CONG. RES. SERV., RS22743, HEALTH CARE FRAUD AND ABUSE LAWS AFFECTING MEDICARE AND MEDICAID: AN OVERVIEW (2014).

<sup>48</sup> Illegal remuneration includes kickbacks, bribes, or rebates to any person to induce another to recommend or purchase a given service. See Danielle Sloan, et al., *Health Care Compliance Issues In Healthcare Mergers and Acquisitions*, BASS BERRY & SIMS, <https://www.bassberry.com/wp-content/uploads/Health-Law-and-Compliance-Update-2019-Edition.pdf>, (last visited 09 Feb. 2022).

<sup>49</sup> Safe harbors exempt qualifying referral arrangements from penalties. See 42 C.F.R. § 1001.952.

<sup>50</sup> 42 U.S.C. § 1320a-7(b);

<sup>51</sup> *Id.*



submissions of claims that violate the AKS.<sup>52</sup> Unlike the Stark Law, liability under the AKS may extend to both physicians and other officials that work to facilitate health care.<sup>53</sup> When companies engage in a practice that could potentially violate the AKS, they may contact the OIG for an advisory opinion or research to see if the OIG has already spoken on the issue.<sup>54</sup> The OIG has recently indicated that digital health care services can trigger AKS violations.<sup>55</sup>

Here, VWH may raise potential AKS liability. If VWH and/or its providers offer patients benefits to use its federally qualified services, this may constitute remuneration in exchange for referrals in violation of the AKS. VW should consider requesting OIG guidance as to whether VWH could continue to provide the virtual services to paying clients. While HTH's previous arrangement was lawful, this merger could pose an issue because VWH will likely accept federal insurance. The merger of a virtual health provider with a digital health data provider is likely lawful, but seeking an advisory opinion is still a wise course of action because of the potential liability.

This merger may also raise Stark Law concerns. The Stark Law bars physicians who have a financial relationship with an entity from making referrals to that entity for "designated health services" for payment under Medicare or Medicaid, unless an exception applies.<sup>56</sup> Outpatient prescription drugs and certain medical supplies qualify as designated health services.<sup>57</sup> Because

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<sup>52</sup> See Staman, *supra* note 47.

<sup>53</sup> *Id.*

<sup>54</sup> An entity may request an opinion by submitting the request to [oigadvisoryopinions@oig.hhs.gov](mailto:oigadvisoryopinions@oig.hhs.gov). The request must contain a signed certification. The OIG is not required to accept the advisory request, and an entity is not absolved of liability simply by submitting a request.

<sup>55</sup> See, e.g., U.S. Dep't of Health and Hum. Servs. Off. of Inspector Gen., OIG Advisory Opinion No. 21-20 (Dec. 13, 2021).

<sup>56</sup> 42 U.S.C. § 1395nn; 42 C.F.R. § 411.351.

<sup>57</sup> 42 CFR § 411.351.

VW intends to facilitate access to prescriptions and medical supplies through VWH, a merger could subject all parties to Stark liability through the employed/contracted physicians' referrals.

This merger could also implicate other federal fraud and abuse laws. The FCA imposes civil liability on anyone who knowingly submits or causes the submission of any false claim for payment to the federal government.<sup>58</sup> The Administrative False Claims Law allows the Secretary of the Department of Health and Human Services (“HHS”) to exclude individuals and entities from participating in federal health care programs if they are convicted of fraudulent activity.<sup>59</sup> The Civil Monetary Penalties Law allows the OIG to impose penalties for violations of federal programs.<sup>60</sup> These penalties are less severe than full exclusion from federal programs and differ based on the harm posed by the violation.<sup>61</sup> If a company is found liable for any offense relating to improper use of Medicare or Medicaid funds, the exclusion statute requires that the OIG exclude that company from participating in any future federal health care programs.<sup>62</sup>

VW is not currently under investigation for any FCA or other violations; however, it should continue to monitor its providers and other staff members throughout and after the transaction. Continuous monitoring could lead to early detection in the event of a violation and ensure that the company is not penalized under the “deliberate indifference” standard. With services being offered virtually, it is especially important that VW is clear on what it can and cannot bill for and the amounts for each service. VW should be sure to self-disclose if it does

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<sup>58</sup> 31 U.S.C. § 3729(a)(1)(A); see also *id.* § 3729(b)(1)(A)(i)–(iii) (defining “knowingly” as a person having “actual knowledge of the information,” “acts in deliberate ignorance of the truth or falsity of the information,” or “acts in reckless disregard of the truth or falsity of the information”).

<sup>59</sup> 42 U.S.C. § 1320a-7(b)(a) (Westlaw through Pub. L. No. 117-80).

<sup>60</sup> See *Fraud & Abuse Laws*, U.S. DEP’T OF HEALTH AND HUM. SERVS. OFF. OF INSPECTOR GEN., <https://oig.hhs.gov/compliance/physician-education/fraud-abuse-laws/> (last visited Feb. 08 2022).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

become aware of any violations. If VWH accepts Medicare and Medicaid patients, it will be subject to these fraud and abuse laws. Our firm can help implement a new internal compliance program and training for VWH.

## **B. Privacy Regulations**

Congress passed the Health Information Portability and Accountability Act (“HIPAA”) Privacy and Security Rules to address growing concerns about health information privacy with the rise of electronic recordkeeping.<sup>63</sup> Under HIPAA, any information that is created or received by a health care provider relating to the physical, mental health, or condition of an individual can be considered protected health information.<sup>64</sup> This means that covered entities must take extra precautions to keep their patients’ protected health information private. Virtual health care companies have to be even more cautious with the virtual platform they use because patient information is more easily accessible.<sup>65</sup> HHS has recognized that if electronic protected health information is intercepted during the physician-patient conversation, the Office of Civil Rights will not find a violation of the HIPAA Security Rule as long as the breach results from good faith activity.<sup>66</sup> Even though HIPAA and other telehealth laws are currently relaxed due to the COVID-19 pandemic,<sup>67</sup> VWH should still ensure it fully complies with all telehealth laws to reduce liability.

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<sup>63</sup> See 45 C.F.R. Part 160, 164(A), (E).

<sup>64</sup> *Id.*

<sup>65</sup> Rashid L. Bashshur, et al., *Telemedicine: A New Health Care Delivery System*, ANNU. REV. PUBLIC HEALTH (2000). However, bad faith efforts will be considered a violation and include intentional invasion of privacy, sale of data, data marketing, and the use of public-facing remote communication products. *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See *Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency*, HHS.GOV (content last reviewed Jan. 20, 2021), <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html>.

Here, HTH has previously been advised that it is not subject to the regulatory requirements of HIPAA because HTH is a vendor that allows its customers to input their own information into the digital platform. However, VWH would likely be subject to HIPAA because under the terms of the proposed merger, customers would input their information into the platform to share their health information with physicians and allied health professionals who are affiliated with the VWH network. While this model slightly differs from the previous structure, it is a sufficient change to bring the new organization within the scope of HIPAA's authority.

In addition to HIPAA, VWH must ensure compliance with the 2018 General Data Protection Regulation ("GDPR"), which has been referred to as the toughest privacy and security law in the world.<sup>68</sup> Accordingly, all parties should continue taking extra precautions to protect patients' information during and after the merger. The Board should consider hiring a data protection officer to oversee VWH compliance and implement staff/employee training.

### **C. Provider Practice Regulations**

Generally, the ability to practice medicine is regulated by each state.<sup>69</sup> Interstate telemedicine compacts are agreements between states that make it easier for health care providers to operate between those states. Just last year, the Center for Medicare & Medicaid Services ("CMS") issued guidance clarifying that a compact does not alleviate a physician's

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<sup>68</sup> See Ben Welford, *What is GDPR, the EU's New Data Protection Law?*, GDPR.EU, <https://gdpr.eu/what-is-gdpr/>. The GDPR applies globally to any company that targets or collects data from anyone related to the European Union. Compared to HIPAA, the GDPRs is broader in scope, offers harsher penalties, and emphasizes that patients have a right for their health information to be forgotten. *Id.*

<sup>69</sup> Delaware conducts its licensing through the Division of Professional Regulation. VW's physicians and staff should maintain their information in accordance with the guidance issued through the office. See *Guide to Information*, DELAWARE.GOV, <https://dpr.delaware.gov>.

responsibility to possess a valid license from each state where they intend to practice.<sup>70</sup> If a compact allows for non-physician providers (“NPP”) to work in a state other than their own, the NPP must still meet the licensure requirement of their primary state of residence and any requirements outlined in the compact between the applicable states.<sup>71</sup> Here, VW contracts with both physicians and other health professionals to facilitate virtual services. It is crucial that all VWH employees/contractors remain in compliance with licensure laws, as a violation could lead to potential liability under the FCA for unauthorized practice of medicine and a fraudulent claim for payment.

#### **D. Food and Drug Administration Regulations**

Although HTH is not subject to the Food and Drug Administration’s (“FDA”) authority, VW and HTH should be mindful of the services they wish to provide through VWH, as they could possibly bring the organization within the FDA’s scope. The FDA is tasked with exerting regulatory authority over many health care products, including a mobile medical app.<sup>72</sup> To help businesses know whether their products need to be regulated, the FDA issues non-binding guidance regarding how it plans to exert its authority. If a business still has questions, it can request an advisory opinion through a confidential letter.<sup>73</sup>

HTH has previously been advised that its digital platform likely would not be subject to the FDA’s regulatory authority. However, the FDA has clarified that software that tracks

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<sup>70</sup> *Medicare Clarifies Recognition of Interstate License Compact Pathways*, CMS (Sep. 16, 2021), <https://www.cms.gov/files/document/se20008.pdf>.

<sup>71</sup> *Id.*

<sup>72</sup> *See U.S. FOOD AND DRUG ADMIN., POLICY FOR DEVICE SOFTWARE FUNCTIONS AND MOBILE MEDICAL APPLICATIONS: GUIDANCE FOR INDUSTRY AND FOOD AND DRUG ADMINISTRATION STAFF* (2019). A mobile medical app is a mobile app that is intended to either be used as an accessory to a medical device or transform a mobile platform into a regulated medical device. *Id.*

<sup>73</sup> *Id.*

medications and provider user-configured reminders “may” be subject to FDA regulation.<sup>74</sup> The same applies for software that provides patients with a portal into their own health information.<sup>75</sup> Since VW aspires to expand HTH’s current platform to allow providers to use it directly to access patients’ electronic health records, prescriptions, and medical supplies, HTH should be mindful that some of its plans could possibly bring the product within the scope of FDA regulation. If so, HTH would need to register the product with the FDA and follow certain labeling requirements.

### **E. Public Disclosures and Reporting Requirements**

Since this is a merger between two publicly traded corporations, the SEC will be heavily involved. Failure to comply with SEC regulations could potentially tank this entire deal. Because this is a public merger, VW and HTH will need to analyze their public disclosure requirements under federal securities laws and the rules of the New York Stock Exchange (“NYSE”).<sup>76</sup> Our firm can assist VW and HTH as they determine the necessity and timing of disclosures early on.

After agreeing on the terms of the merger, the parties should issue a press release to inform shareholders, the investing community, and the general public that a merger is pending.<sup>77</sup> While a press release is not required, the NYSE requires its members to publicly disclose information that is material to them and could reasonably be expected to affect the market for their stock.<sup>78</sup> The release should include the material terms and other highlights of the transaction (e.g., the parties, consideration, merger structure, closing conditions, required approvals, and

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Public Mergers Disclosure: Overview*, THOMSON REUTERS PRACTICAL LAW, [https://1.next.westlaw.com/0-382-1406?isplcus=true&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://1.next.westlaw.com/0-382-1406?isplcus=true&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

important dates). The parties may also satisfy the public disclosure requirement through various SEC filings to be discussed further below in section V.<sup>79</sup>

The Securities Exchange Act of 1934 (“Exchange Act”) requires reporting companies to file SEC's Form 8-K when the reporting company enters into a merger agreement. The 8-K must include when the reporting company's shareholders are to approve the merger and any other material events or corporate changes that could be of interest to shareholders.<sup>80</sup> VW will also need to file a proxy statement with the SEC so that shareholders can make an informed decision on the potential merger.<sup>81</sup> A merger proxy statement is subject to the SEC's review.<sup>82</sup> If the SEC has comments to the preliminary proxy statement, amendments may need to be made before a definitive proxy statement is approved by the SEC.<sup>83</sup> Once all amendments are made and the SEC approves the proxy statement, it is delivered to shareholders.<sup>84</sup>

Additionally, because VW plans to issue its securities as part of the merger consideration, it must register its securities with the SEC unless an exception applies.<sup>85</sup> VW should file a Form S-4 registration statement to register its securities for the public merger. The Securities Act and the Exchange Act allow the Form S-4 registration statement to be integrated with HTH's proxy statement.<sup>86</sup> This comprehensive merger disclosure document is known as the proxy statement/prospectus or joint proxy statement/prospectus.<sup>87</sup>

Pursuant to Section 16 of the Exchange Act, "insiders" of VW and HTH, including certain officers, directors, and beneficial owners of more than 10 percent of the company's equity

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

securities, must report their ownership of the company's securities.<sup>88</sup> After the merger, any new officers, directors, or owners of more than 10 percent of VWH's securities must accordingly report their ownership to the SEC. Additionally, HTH insiders need to be mindful of Section 16 when purchasing and selling HTH securities in anticipation of the public merger in order to avoid short-swing profit<sup>89</sup> liability.<sup>90</sup>

Entering into voting agreements in connection with the public merger may also trigger a disclosure obligation under Section 13(d) of the Exchange Act.<sup>91</sup> VW and any shareholders that are parties to a voting agreement may have to file an initial or amendment to a Schedule 13D to advise the SEC and the public of a change in voting rights that could result in a change in beneficial ownership of HTH's stock.<sup>92</sup> Sections 13(d) and 13(g) of the Exchange Act require persons or groups who own or acquire beneficial ownership of more than 5 percent of certain classes of equity securities to file reports with the SEC within ten calendar days of becoming a "beneficial owner."<sup>93</sup> Because the merger will likely create new beneficial owners, such owners must be notified and made aware of their new reporting obligations.

Section 16(a) of the Exchange Act requires that directors and officers of a company that have a class of securities registered under Section 12 of the Exchange Act, as well as persons who beneficially own over 10 percent of any class of equity security (other than an exempted security) which is registered under Section 12 of the Exchange Act, file reports with the SEC on

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<sup>88</sup> *Id.*

<sup>89</sup> "Short-swing profits" are profits made from a sale or purchase of the public company's securities made less than six months of a matching purchase or sale.

<sup>90</sup> *Public Mergers Disclosure: Overview*, *supra* note 76.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Arthur Zwickel and Alicia Harrison, *SEC Reporting Obligations Under Section 13 and Section 16 of the Exchange Act*, PAUL HASTINGS (Feb. 6, 2019), [https://www.paulhastings.com/insights/client-alerts/sec-reporting-obligations-under-section-13-and-section-16-of-the-exchange-act#:~:text=Section%2016\(a\)%20of%20the,an%20exempted%20security](https://www.paulhastings.com/insights/client-alerts/sec-reporting-obligations-under-section-13-and-section-16-of-the-exchange-act#:~:text=Section%2016(a)%20of%20the,an%20exempted%20security). A beneficial owner of a security is a person who has voting power. *Id.*



Forms 3, 4, and 5.<sup>94</sup> Under Section 16(b) of the Exchange Act, each of these “insiders” may be liable for any short-swing profits.

Post-merger, quarterly certifications under Sections 302 and 404 of the Sarbanes-Oxley Act must cover the entire company.<sup>95</sup> Sarbanes-Oxley states that the signing officers are directly responsible for the accuracy, documentation, and submission of all financial reports to the SEC.<sup>96</sup> Because of this, it is important to do due diligence on VW to identify any potential compliance issues pertaining to the accuracy of its accounting figures. Our firm will help the parties execute all required public disclosures and reporting.

#### **F. Antitrust Issues**

The size of the market share of the combined company may present antitrust implications. However, due to the relatively small projected valuation of the transaction, VW should not have to provide notice of the merger to the Federal Trade Commission (“FTC”). Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976<sup>97</sup> (the “HSR Act”), requires all “persons” contemplating certain mergers or acquisitions, which meet or exceed the jurisdictional thresholds in the Act, to notify the FTC and the Assistant Attorney General and to wait a certain time period prior to effectuating such transactions.<sup>98</sup> To initiate this waiting period, the merging parties must file a pre-merger notification form with the FTC and Department of Justice.<sup>99</sup> If a transaction satisfies

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<sup>94</sup> *Id.*

<sup>95</sup> Sammer Joanne, *Mergers and Acquisitions in the Age of Sarbanes-Oxley*, COMPLIANCE WEEK (April 2005), <https://www.complianceweek.com/mergers-and-acquisitions-in-the-age-of-sarbanes-oxley/7175.article>.

<sup>96</sup> *SOX Section 302: Corporate Responsibility for Financial Reports*, SARBANES OXLEY 101 (Feb. 9, 2022), <https://www.sarbanes-oxley-101.com/SOX-302.htm>.

<sup>97</sup> 15 U.S.C. 18a (1976).

<sup>98</sup> 15 U.S.C. 18d (1976).

<sup>99</sup> *Id.*

the following three threshold tests and no exemption applies, the transaction is within the scope of the HSR Act: (1) commerce test; (2) size-of-person test; and (3) size-of-transaction test.<sup>100</sup>

In this transaction, the commerce test is met because both parties are engaged in commerce through providing virtual health care services. Next, the minimum size-of-transaction threshold is triggered when a transaction's value exceeds \$101 million.<sup>101</sup> Similarly, the size-of-the-person test only applies where the size-of-transaction is greater than \$101 million.<sup>102</sup> Because the projected valuation of this transaction is only between \$30 to \$32 million, the size-of-transaction and size-of person tests are not satisfied. Thus, VW should not have to provide notice of the merger to the FTC. Similarly, Delaware antitrust laws align and operate in accordance with federal antitrust laws.<sup>103</sup>

In sum, VW must consider the various legal and regulatory issues implicated by this merger. Our firm will work with the parties to ensure compliance with all aforementioned laws throughout the course of the transaction.

#### **IV. Business and Strategic Considerations**

The Board should contemplate several business and strategic considerations involved in this merger. Our firm concludes that VW would predominantly benefit from a merger with HTH in terms of business and strategic growth. First, if the merger is successful, VW shareholders will still be majority owners in the company, owning 58 percent of the combined entity. Second, VWH's patients and providers alike will benefit from the integration of a virtual health care

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<sup>100</sup> 15 U.S.C. 18a(a)(2)(A-C) (1976).

<sup>101</sup> *Merger Review*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/news-events/media-resources/mergers-and-competition/merger-review>.

<sup>102</sup> *Id.*

<sup>103</sup> Richard A. Duncan & Allison K. Guernsey, *Waiting for the Other Shoe to Drop: When Will State Courts Follow Leegin?*, 27 FRANCHISE LAW JOURNAL 3 (2008).

provider with a digital health data provider. However, there are a few concerns of which VW should be cautious moving forward. For example, VWH will have to comply with the previously mentioned corporate, tax, and legal requirements. In addition, VW also needs to ensure the parties agree on the mission and culture of VWH. Further, VW should ponder some post-merger considerations.

### **A. Positive Business Aspects of the Merger**

First, VW would benefit from merging with HTH from a general business perspective because VW would still be majority owners after VWH is formed. Second, if VWH is formed, patient care will improve because VWH will be a full-service virtual platform that will allow patients to receive health care virtually with seamlessly integrated personal health data available to the providers. This will equip providers with as much information to offer more comprehensive treatment. This will likely lead to increased revenue for shareholders because no other company in the space can offer both virtual health services and digital health data. Telemedicine in general is exponentially growing in popularity and is benefiting individuals who would otherwise not receive the necessary care.<sup>104</sup> Integrating a digital health data platform like HTH's is the next logical step towards industry dominance.

Moreover, VWH can provide beneficial treatment to individuals with chronic conditions and help reduce emergency room visits. Patients across the globe can access necessary treatment more efficiently by simply logging onto an app on their phone. VWH will have the ability to

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<sup>104</sup> See, e.g., *Telemedicine Program Performs 10,000th Visit*, UNIVERSITY OF ROCHESTER MEDICAL CENTER (April 14, 2011), <https://www.urmc.rochester.edu/news/story/telemedicine-program-performs-10000th-visit> (illustrating a study conducted in Rochester, New York, which revealed how access to telemedicine positively impacted children with acute illness).

provide medications and supplies to patients internationally; this kind of capacity will separate VWH from other health care providers and facilities and allow VWH to succeed in this sector, especially given the soaring demand for virtual health care in the COVID-19 era. In short, this merger will likely lead to explosive growth for VWH. By integrating HTH—a digital health management company with high user satisfaction—with VW’s already existing virtual health care providers, VWH could position itself as an industry leader for the 21<sup>st</sup> century and beyond.

### **B. Potential Concerns for VW Moving Forward**

In addition to maintaining compliance with the corporate, tax, legal, and regulatory issues discussed above, VW also needs to ensure that VW’s and HTH’s strategies align; all parties must be on the same page concerning the mission and culture of VWH. For example, VW has provider arrangements with private practitioners, whereas HTH uses a form of “coaching” to help patients manage their conditions. Having physicians be a part of VWH is crucial to its success, especially because one of the goals of the combined company is to facilitate prescriptions. In addition, VW’s platform accepts insurance from Medicare and Medicaid. If VWH is formed, the company still needs to accept Medicare and Medicaid insurance to help cover the cost of the services it provides. Since VWH providers will likely prescribe medication and medical supplies for patients, insurance payments will be a major, if not predominant, source of revenue for VWH.

### **C. Post-Merger Considerations**

If the merger is successful, all parties need to consider the structure of VWH’s board of directors and compliance training in areas with which HTH members are not familiar. In terms of the structure of the new board of directors, since VW shareholders will have majority ownership of the new company, a reasonable ratio of VW board members to HTH board members would be

around 8:5. This would ensure that decisions made within the combined company reflect the ownership makeup.

In addition, depending on the structure of merger VW intends to pursue, it will either need to change its name from VW to VWH or create a new company entirely. Either way, branding, promoting, and public relations all come into play. VWH will need to brand the new company, invest in promotion efforts to the public, create a new or modified mission statement, and educate patients on what VWH will provide. The Board should consider hiring a public relations consultant to lead these efforts. This person would promote VWH through social media, advertisements, and other creative means. In addition, this consultant would amend the company mission statement to reflect the new aspects of VWH, such as direct provider use and easy access to prescriptions and medical supplies. Having a person in charge of public relations would ultimately be a way to ensure VWH is getting necessary recognition while not interfering with the logistics of forming a new company like board decisions and negotiations with HTH.

Our firm will help navigate through these business and strategic considerations to achieve the best outcome for VW.

## **V. Process for Approval and Necessary Documents**

Our firm can also assist the parties in seeking approval of the transaction and drafting the necessary documents. The first step is to draft a merger agreement.<sup>105</sup> The merger agreement is to be written in conjunction with HTH and is to include provisions for the deal such as the purchase price, the mechanics of the deal, any representations and warranties, an outline of the financial condition of each company, any actions to be taken or not taken, any conditions to the

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<sup>105</sup> See Christopher, et al., *supra* note 30.

deal such as regulatory approval, any fiduciary considerations, and deal protections such as circumstances where the Board must consider competing offers and a breakup fee.<sup>106</sup>

The next step is to draft a proxy statement and file it with the SEC in Form DEF 14A.<sup>107</sup> The proxy statement will include information on the deal's background, terms, financial information, target board recommendations, a fairness opinion from an investment bank representing HTH, information regarding the shareholder vote, and information about directors, officers, and major shareholders.<sup>108</sup> Since this merger involves stock consideration, we must also file a registration statement with the SEC, Form S-4.<sup>109</sup> The S-4 will contain information such as risk factors, financial projections, and material contracts between VW and HTH.<sup>110</sup>

The SEC then has ten calendar days to inform us whether it will review our filing.<sup>111</sup> If the SEC opts to review our filing, we will wait typically about 30 days for comments.<sup>112</sup> Such comments may include recommendations for amendments to the proxy statement and/or registration statement.<sup>113</sup> We then make any amendments per the SEC comments and resubmit for approval. Next, we seek shareholder approval. Under Delaware law, a shareholder vote for approval of a merger may not be held prior to twenty days after notice of the meeting and vote, included in the proxy statement, is mailed.<sup>114</sup> Then, both HTH and VW shareholders need to approve this deal based on the same SEC-approved proxy statement. Finally, upon shareholder approval, we submit Form 8937 to the Department of the Treasury. Form 8937 is required when

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<sup>106</sup> *Id.*; see also *Merger Agreement Commentary: Public Mergers and Acquisitions*, THOMSON REUTERS PRACTICAL LAW, *Merger Agreement Commentary: Public Mergers and Acquisitions*.

<sup>107</sup> See Will Kenton, *SEC Form DEF 14a*, INVESTOPEDIA (Feb. 14, 2021), <https://www.investopedia.com/terms/s/sec-form-def-14a.asp>.

<sup>108</sup> See Christopher, et al., *supra* note 30.

<sup>109</sup> *Id.*

<sup>110</sup> Will Kenton, *SEC Form S-4 Defined*, INVESTOPEDIA (May 7, 2021), <https://www.investopedia.com/terms/s/sec-form-s-4.asp>.

<sup>111</sup> See Christopher, et al., *supra* note 30.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Del. Code tit. 8 § 251.

organizational action is taken that affects the basis of holders of a security.<sup>115</sup> Our firm will assist throughout this entire drafting and approval process.

## **VI. Final Recommendations**

Our firm suggests that VW merge with HTH to form VWH. Such a merger presents the most efficient way for VW to distinguish itself from the competition by providing virtual patients and providers with a seamlessly integrated digital health data platform. Our firm can assist the parties with navigating through the various corporate, tax, regulatory, and business and strategic issues implicated by this transaction. Although the potential transaction implicates federal, state, and international laws, this should not be a major hindrance to the transaction. VW is currently already subject to many of these laws and regulations, so its Board and employees should be familiar with them. Our firm will lead due diligence efforts to investigate potential liabilities that would pose a threat to negotiations or influence the preferred business structure. While a triangular merger offers the most protection for VW, we will help formulate and negotiate the best reorganization structure to advance VW's goals.

VW should greatly benefit from this transaction. VW will be the majority owner of VWH, owning 58 percent of the combined entity, and patient access to quality, personalized, data-driven health care will significantly increase. As long as VW carefully navigates the decisions that would occur post-merger, such as selecting a mission and culture, defining board member ratio, and re-branding VWH, the merger's business aspects should operate smoothly.

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<sup>115</sup> *Instructions for Form 8937*, INTERNAL REVENUE SERVICE (Dec. 2017), <https://www.irs.gov/pub/irs-pdf/i8937.pdf>.