The following materials are intended to provide some valuable information and to highlight various provisions and issues that arise in connection with the acquisition, transition of operations and financing of senior living facilities.

As you will see, these transactions are real estate oriented. They require many of the same documents that are used in any typical purchase. But health care transactions will always require greater disclosure and additional language in standard documentation and perhaps additional documentation based upon the structure of the transaction. The following materials describe nuances that arise in four particular instruments:

1. A Purchase and Sale Agreement.

2. An Operations and Transfer Agreement.

3. A Master Lease.

4. A Loan Agreement.

We have also provided a Loan Checklist, Revolving Credit Checklist and Due Diligence Checklist which provide an idea of the scope of the materials required.

Furthermore, although not addressed in these materials, almost every senior housing transaction will require the need for licensing approvals to deal with operations and the ability to receive reimbursement for Medicare, Medicaid and other available programs.

We hope that these materials provide a source of information to assist those practitioners who do not handle these matters on a regular basis.
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<td>5.</td>
<td>Closing Checklists: Term Loan, Revolving Credit Loan and Due Diligence.</td>
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A HEALTHCARE PURCHASE AND SALE AGREEMENT:
ANNOTATED PROVISIONS

This paper uses provisions of a hypothetical purchase and sale agreement to illustrate subjects of particular relevance to the acquisition of skilled nursing facilities. The provisions come from several real purchase and sale agreements and have been tailored to reflect loosely the facts of the hypothetical transaction summarized above. The purpose of this paper is not to turn real estate lawyers into healthcare lawyers. Transactions involving skilled nursing facilities, however, like those involving other healthcare facilities, are fundamentally real estate transactions and are often led by real estate lawyers. The goal of this paper is to alert real estate attorneys who may not work regularly in this area to issues unique to transactions involving skilled nursing facilities so that they can enlist colleagues and consultants with appropriate expertise where needed and manage the many parts of the transaction efficiently.

Part I of the paper discusses the senior housing industry in general and what specifically is meant by the terms “skilled nursing facility” and “nursing home,” which are used interchangeably. Part II discusses the assets that comprise and are typically acquired when buying a skilled nursing facility, as well as certain liabilities that typically are not assumed. Part III addresses aspects of due diligence that are of particular importance to the acquisition of a skilled nursing facility. Part IV deals with closing conditions that, in the context of buying skilled nursing facilities, raise regulatory and timing issues. And Part V identifies post-closing transitional issues that may have to be addressed in connection with the purchase of a skilled nursing facility.

In addition to federal statutes and regulations, this paper cites statutes of Florida, Massachusetts, Pennsylvania, and Virginia to illustrate some of the regulatory issues present in transactions involving skilled nursing facilities. These states were chosen from those involved in the hypothetical transaction set forth above simply for geographic distribution. (The other states involved are Rhode Island, Connecticut, New Jersey, Tennessee, and Georgia.) The statutes cited do not necessarily represent the regulatory schemes of other states.

Part I. Types of Senior Housing and the Meaning of “Skilled Nursing Facility.”

Sample Provision:

Seller is (a) the owner of certain real property in the states of Pennsylvania, New Jersey, Tennessee, Virginia, Massachusetts and Rhode Island located at the addresses and as legally described on Exhibits A-1 through A-15 hereto and all improvements thereon, and (b) is the lessee of certain real property and improvements in the states of Florida, Georgia, New Jersey and Connecticut located at the addresses and as legally described on Exhibits A-16 through A-25, which, together with certain tangible and intangible personal property also owned by Seller, comprise twenty five (25) skilled nursing facilities (each, a “Facility” and, collectively, the “Facilities”).
Discussion:

“Senior housing” can mean many things:

- Independent living facilities.
- Assisted living facilities.
- Residential care facilities.
- Skilled nursing facilities, also known as nursing homes.
- Continuing care retirement facilities.

Types of senior housing are typically distinguished by the kinds and levels of assistance they provide to their residents. Independent living facilities, also known as congregate care facilities, typically offer apartment-style units with kitchens, but also a common dining facility, and limited services, such as housekeeping or transportation. See Timothy J. Boyce, Financing Senior Living Facilities, Probate and Property Magazine, March/April 1996, at 23. They serve residents generally able to function with very limited assistance. Residential care facilities offer more support and supervision and can be appropriate for residents with mild Alzheimer’s and dementia.

The Federal Housing and Community Development Act of 1992 defines assisted living as a state-licensed and regulated facility that “makes available to residents supportive services to assist the residents in carrying out activities of daily living, . . . may make available to residents home health care services, such as nursing and therapy, [and] provides separate dwelling units for residents, each of which may contain a full kitchen and bathroom.” 12 U.S.C. §1715w(b)(6)(2001). Speaking more broadly and, perhaps, more aspirationally, the Assisted Living Federation of America defines assisted living “as a special combination of services, personalized assistance and health care designed to respond to the individual needs of those who need help with activities of daily living . . . Supportive services are available, 24 hours a day, to meet scheduled and unscheduled needs, in a way that promotes maximum dignity and independence for each resident and involves the resident’s family, neighbors, and friends.” Quoted in Jacque Woodring, Deer Springs Assisted Living: A Case Study, Real Estate Review Journal, Summer 2012.

A skilled nursing facility provides the most extensive services of any type of senior housing. In addition to assistance with activities of daily living, including feeding, bathing, grooming and dressing (called “ADLs” in the industry), residents have access to round-the-clock medical, nursing and rehabilitative care provided by nurses, physical therapists, occupational therapists, pharmacists and other licensed professionals. Reflecting the condition of most residents of skilled nursing facilities, units are more like hospital rooms than apartments and have no kitchens and minimal furniture.
A continuing care facility may combine features of independent living, assisted living and skilled nursing facilities. Residents of continuing care facilities typically take occupancy needing a relatively lower level of service, but have the right to remain in the facility and move as needed to ever-higher levels of care.

States adopt their own definitions of different types of senior housing, so the definitions above should be considered illustrative only. Here are two examples of state definitions of skilled nursing facilities, one from Florida and one from Virginia:

“Nursing home means any premises operated for profit in which nursing care and related medical or other health services are provided, for a period exceeding twenty-four hours for two or more individuals, who are not relatives of the operator, who are not acutely ill and in need of hospitalization, but who, because of age, illness, disease, injury, convalescence or physical or mental infirmity need such care.” 62 Pa. Cons. Stat. Ann. § 1001 (West 2010).

“‘Nursing home’ means any facility or any identifiable component of any facility licensed pursuant to this article [Chapter 5, Title 32.1, VA Code Ann. (2004)] in which the primary function is the provision, on a continuing basis, of nursing services and health-related services for the treatment and inpatient care of two or more nonrelated individuals, including facilities known by varying nomenclature or designation such as convalescent homes, skilled nursing facilities or skilled care facilities, intermediate care facilities, extended care facilities and nursing or nursing care facilities.” VA Code Ann. §32.1-123 (2011).

(This paper is focused on skilled nursing facilities as a segment of the senior housing industry but, as these definitions reveal, skilled nursing facilities may serve residents of any age that need the level of care they provide – people recovering from accidents, and people who have been disabled by injury or disease, for example.)

A 2011 report on skilled nursing facilities provides some interesting facts about this segment of the senior housing industry:

• At the time of the survey, there were 15,465 certified facilities in the United States with 1,646,302 beds and 1.4 million residents.

• In 2010, 13% of the U.S. population was 65 or older. By 2040, 20% of the U.S. population will occupy that demographic.

• The average size of skilled nursing facilities in the U.S. was 108.5 beds, but varied widely by state. In New York skilled nursing facilities had, on average, 186 beds; in Alaska, 42.5.

• The average occupancy rate of skilled nursing facilities across the U.S. was 83%, again with wide variations by state. South Dakota’s average occupancy rate was the highest in the nation at 100% (joining nine other states with occupancy rates above 90%). Montana’s occupancy rate was the lowest at 69.5%, joining five other states with rates less than 70%.
• 95% of skilled nursing facilities were certified to participate in both Medicare and Medicaid. Overall, Medicaid paid the expenses of over 63% of residents, Medicare 14.5%. 22% of residents paid privately. Some of these statistics also vary widely by state, however, presumably reflecting the fact that Medicare is administered federally, Medicaid by the states. In Iowa, Medicaid paid for 47% of residents and private sources paid for 45%. In Alaska and the District of Columbia, Medicaid paid for over 80% of residents.

• Nationally, 68% of skilled nursing facilities were for-profit. In some states, however, this percentage exceeded 80% (e.g., Arkansas, Oklahoma and Oregon); in others, it was less than 50% (e.g., Minnesota and South Dakota). Over half of all skilled nursing facilities were owned by companies that have multiple facilities.


Part II: What Makes up a Skilled Nursing Facility? Assets to be Acquired and Liabilities to be Avoided.

A. Assets to be Acquired -- Sample Provision:

[...]

Seller agrees to sell to Buyer on the Closing Date, and Buyer agrees to purchase on the Closing Date, in accordance with the terms of this Agreement:

(a) The land described on Exhibits A-1 through A-15 hereto, together with any and all privileges and easements appurtenant thereto (the “Land”);

(b) The existing buildings, fixtures, structures and other improvements located upon the Land, together with, to the extent not constituting Personal Property, apparatus, equipment and appliances incorporated therein and used in connection with the operation and occupancy thereof, but specifically excluding the property more particularly described on Schedule [*] (the “Improvements”);

(c) All of Seller’s right, title and interest in and to the leases identified on Schedule [*] hereto (the “Leases”) pursuant to which Seller leases the real property identified on Exhibits A-16 through A-25;

(d) All tangible personal property located at the Facilities and used in connection with the operation of the Facilities, including, but not limited, to inventory, supplies, furnishings, moveable trade fixtures, and vehicles, but specifically excluding the property more particularly described on Schedule [*] (the “Personal Property”);

(e) to the extent assignable, all governmental permits, licenses, certificates, accreditations, approvals and authorizations used in or relating to the ownership, occupancy or operation of any of the Facilities, including any permit, license, accreditation or other approval