PURCHASING A PHARMACY: STATE LICENSE, DEA PERMIT, MEDICAID NUMBER, THE NCPDP, AND OTHER REGULATORY ISSUES

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INTRODUCTION

- For purposes of the following slides, assume the following:
- John Smith is the sole stockholder of ABC Pharmacy, Inc.
- Jim Johnson is the sole stockholder of XYZ Pharmacy, Inc.
- ABC will sell its assets to XYZ - or - Smith will sell his stock (in ABC) to either Johnson or XYZ.
“C” corporations are somewhat antiquated. “C” corporations, or a variation, have been around for hundreds of years.

Assume that ABC is a “C” corporation. With a “C” corporation, there is double taxation for Smith. Before declaring a dividend, ABC must pay taxes. When Smith does receive a dividend, he has to pay taxes on the dividend.

If ABC sells its assets to XYZ, then the sale proceeds will go to ABC. ABC will be taxed on the sale proceeds. The proceeds will then be distributed to Smith in the form of a dividend. Smith will be taxed on the dividend.
Today, most pharmacies are either limited liability companies ("LLCs") or Subchapter "S" corporations. A pharmacy can also be an LLC with a Subchapter "S" election.

With both a LLC and a Subchapter "S" corporation, there is no double taxation. Income and expenses "pass through" to the individual owner’s tax return.

Note that with a Subchapter "S" corporation, only an individual (e.g., John Smith) can be a stockholder. An entity (e.g., XYZ) cannot be a stockholder.
INTRODUCTION

- There are a number of reasons why Smith may want to sell all or a portion of ABC.
- Smith has built ABC into a successful business and Smith wants to “cash out.”
- Smith wants to sell a portion (but not all) of ABC in order to bring in capital to expand ABC.
- ABC is getting hammered financially by a combination of reimbursement cuts and audits....and Smith simply wants to “get out.”
WHAT A PURCHASER LOOKS FOR IN ACQUIRING A PHARMACY
WHAT A PURCHASER LOOKS FOR

- Product Mix - Does ABC provide a variety of products or does ABC provide a narrow product line?
- Licenses, Permits and Numbers - Does ABC have a pharmacy license, DEA permit and Medicaid provider number for each of its locations? With an asset sale, ABC cannot transfer its licenses/permits/numbers to XYZ; XYZ will need to secure its own licenses/permits/numbers.
WHAT A PURCHASER LOOKS FOR

- Licenses, Permits and Numbers - Generally, with a stock sale, ABC’s Medicaid provider number, state pharmacy license, and DEA permit will remain intact with ABC following the sale. In some states, ABC will have to obtain a new Medicare permit, pharmacy license and DEA permit after the sale.

  - It is important to check with state agencies to determine whether ABC will be able to operate under its existing license and permit until it secures a new license and permits.
WHAT A PURCHASER LOOKS FOR

- Licenses, Permits and Numbers - Are any of ABC’s licenses, permits and numbers at risk of being terminated?
- Payer Mix - The more diverse the payer mix, the better.
WHAT A PURCHASER LOOKS FOR

- Medicaid Issues - Does ABC have a good relationship with the State Medicaid programs it bills?
- Employment and Independent Contractor Issues - If ABC markets through bona fide W2 employees, then kickback issues should not arise. Conversely, if ABC markets through 1099 independent contractors, then there is a risk of violation of the Medicare anti-kickback statute.
WHAT A PURCHASER LOOKS FOR

- Referral Source Issues - Does ABC directly or indirectly provide “anything of value” to physicians, hospitals and other referral sources? If so, then there is a risk of violation of the Medicare anti-kickback statute and/or the Stark physician self-referral statute.

- Documentation Issues - Does the documentation in ABC’s patient files support the claims submitted by ABC to third party payers?
WHAT A PURCHASER LOOKS FOR

- Litigation and Audits - If ABC has been audited in the past, what were the results of the audits? Is ABC currently being audited? Is ABC aware of any potential audits that may be instigated? The same types of questions apply to lawsuits.
WHAT A PURCHASER LOOKS FOR

- Legal - Is ABC’s corporate minute book up-to-date? Have all of ABC’s arrangements been reduced to written contracts?
- Financial - Have financial statements been prepared by a CPA?
- Understanding Day-to-day Operations - How efficiently is ABC run on a day-to-day basis?
STOCK PURCHASE
STOCK PURCHASE

- Assume that Smith sells his ABC stock certificate to XYZ.
- ABC becomes the wholly-owned subsidiary corporation of XYZ.
- ABC and XYZ remain separate legal entities.
STOCK PURCHASE

- Generally speaking, ABC keeps “humming along” the same as it always has ... same tax ID #, same Medicaid provider numbers, same state licensure, same DEA permits, same third party payer contracts, etc.
- State rules on Medicaid registration and state licensure may vary.
- Breaks in billing are less likely to occur with a stock transaction.
STOCK PURCHASE

- Each pharmacy is issued a National Provider Identifier ("NPI") by the CMS National Plan & Provider Enumeration System ("NPPES").
- Each pharmacy is also issued a number by the NCPDP.
- Generally with a stock purchase, the purchaser will keep the pharmacy’s NPI and NCPDP.
STOCK PURCHASE

- Notice of the change of ownership must be given to state licensing agencies, state Medicaid programs, NCPDP, DEA, NPPES, and perhaps to third party payers.
- In some states, following a stock sale the state pharmacy license and DEA permit remain intact.
- In other states, ABC will need to obtain a new license and permit. Generally, these states permit the pharmacy to continue operating under the existing permits until the new ones are issued.
Third Party Payers (“TPP”) - Some TPP contracts will be silent when there is a change in ownership of ABC. Other TPP contracts will require that ABC notify the TPP in advance of a change of ownership. Other TPP contracts will require the TPP’s approval of the new owner in order for the TPP contract to remain in force.
Let’s say that ABC gets hit with claims, including fraud allegations, after closing for activities occurring before closing.

These claims will affect ABC.

Subject to limited exceptions, the claims will not flow up the food chain and be asserted against XYZ.
Let’s assume that ABC gets hit with claims, including fraud allegations after closing for activities occurring after closing. These claims will affect ABC. Subject to limited exceptions, the non-fraud related claims will not flow up the food chain and be asserted against XYZ. However, there is a possibility that fraud-related claims will flow up the food chain and be asserted against XYZ.
STOCK PURCHASE

- XYZ can protect itself as follows:
  - Through due diligence
    - UCC search to determine if there are liens against ABC’s assets
    - Confirmation that ABC’s corporate charter is in good standing
    - Confirmation that ABC has paid its franchise taxes, employee payroll taxes, business personal property taxes, and other taxes.
STOCK PURCHASE

• Confirmation that the following are current and unencumbered: pharmacy licensure, Medicaid provider numbers and DEA permits
• Review of past, current and anticipated audits and investigations
• Review of past, current and anticipated litigation
• Review of random sample of patient files to determine if they support the claims submitted by ABC.
• Review of how ABC generates its business. In particular, does ABC do anything that could be construed to violate the Medicare anti-kickback statute, the Stark physician self-referral statute, the beneficiary inducement statute and/or the telephone solicitation statute?
STOCK PURCHASE

- Personal indemnification by Smith - XYZ will ask Smith to indemnify XYZ against damages incurred by XYZ as a result of Smith’s breach of certain “reps and warranties” contained in the Stock Purchase Agreement.

- It will be XYZ’s intention to pay only a portion of the purchase price (e.g., 75%) at closing. The balance of the purchase price will be paid after closing. This will give XYZ a “pot of money” to grab in the event that Smith breaches his “reps and warranties.”

- On the other hand, it will be Smith’s intention to be paid as much of the purchase price as possible up front, and to receive as little of the purchase price on the back end as possible.
STOCK PURCHASE - MECHANICS

- The parties sign a Mutual Non-Disclosure Agreement. This states that the parties will share confidential information ... and that they will keep such information confidential.
- ABC gives financial documents to XYZ.
- The parties will reach a verbal agreement.
- The parties will reduce their verbal agreement to a written document called a “letter of intent.” This is non-binding, but detailed, and sets out the “terms of the deal.”
STOCK PURCHASE - MECHANICS

- XYZ conducts due diligence. This is where XYZ “kicks the tires” of ABC so that XYZ knows what it is purchasing. Due diligence is described in the previous slides under the heading “What a Purchaser Looks For in Acquiring a Pharmacy.”

- Assuming that XYZ is satisfied with the results of the due diligence, then “closing” occurs. This is when the Stock Purchase Agreement and related closing documents are signed and XYZ pays a portion of the purchase price.

- If XYZ desires to merge ABC into XYZ, then XYZ should wait for a period of time before implementing the merger. This will give XYZ time to determine if ABC has any hidden “skeletons in the closet.”
Assume that ABC has a Medicare Part B Supplier Number ("PTAN") for DME.

A PTAN allows ABC to submit claims to Medicare.

In a stock sale, ABC’s PTAN will remain intact.

Following closing, ABC will need to submit a revised Medicare form 855S to the National Supplier Clearinghouse ("NSC").
ASSET PURCHASE

- After closing, Smith will continue to own ABC.
- ABC will be a “shell” corporation. It will have no assets other than the purchase price paid by XYZ.
ASSET PURCHASE

- If post-closing claims are asserted against ABC as a result of ABC’s pre-closing actions, then they are not XYZ’s problem.
- In an asset acquisition, as a general rule the purchaser does not assume any of the seller’s obligations ... unless the purchaser chooses to do so.
ASSET PURCHASE

- XYZ can protect itself by taking the same steps to protect itself with a stock purchase.
- Having said this, normally the due diligence pertaining to an asset purchase does not have to be as thorough as due diligence pertaining to a stock purchase. This is because, as a general rule, XYZ does not assume any of ABC’s liabilities.
ASSET PURCHASE

- The parties will sign a Mutual Non-Disclosure Agreement. This states that the parties will share confidential information ... and that they will keep such information confidential.
- ABC gives financial documents to XYZ.
- The parties will reach a verbal agreement.
- The parties will reduce their verbal agreement to the “letter of intent.”
ASSET PURCHASE

- XYZ conducts due diligence.
- Assuming that XYZ is satisfied with the results of the due diligence, then “closing” occurs. This is when the Asset Purchase Agreement and related closing documents are signed and XYZ pays a portion of the purchase price.
- Similar to a stock purchase, in an asset purchase, XYZ will desire to pay as much of the purchase price on the back end as possible. On the other hand, ABC will desire to be paid as much cash up front as possible and to receive as little of the purchase price on the back end as possible.
- At closing, the parties will execute the appropriate instruments necessary to transfer assets, assign leases or sublet premises, assign contracts and other documents necessary to transfer the business.
POWER OF ATTORNEY

- If XYZ takes over the ABC facility, then XYZ will need to obtain a new pharmacy license, DEA permit, Medicaid registration, and all other licenses and permits for the facility.

- Generally, the parties are able to sign a Power of Attorney at closing that will allow XYZ to utilize ABC’s licenses and permits until XYZ secures its own licenses and permits for the ABC facility.

- Some states do not permit Powers of Attorney, and in those states, asset transactions can be more complicated and require additional planning to execute and minimize disruptions in business.
In an asset purchase, the purchaser will generally opt to obtain a new NPI and NCPDP. Although, if it chooses, the purchaser can keep the existing NPI and NCPDP number.

If XYZ decides to obtain a new NPI, it must also obtain a new NCPDP number - the numbers are tied to each other. XYZ will need to work with the NCPDP to obtain a new NCPDP number and NPI. The timing that these numbers become effective depends on the type of transaction and whether the pharmacy’s other numbers have been issued.

The purchaser is permitted to use the pharmacy’s existing NPI and NCPDP under a Power of Attorney, if needed.
ASSET PURCHASE – DME PTAN

- Assume that ABC has a PTAN at its Main Street facility. Assume that XYZ will take over ABC’s facility.
- XYZ will need to obtain a new PTAN for the Main Street facility.
- Assume that “closing” of the asset purchase occurs on 8/1. Assume that as of 8/1, XYZ is accredited (as a DME supplier) for the Main Street facility, XYZ has the required DME license for the Main Street facility, and XYZ has the surety bond for the Main Street facility.
ASSET PURCHASE - DME PTAN

- Assume that on 8/1, XYZ submits a new Medicare form 855S for a PTAN for the Main Street facility.
- Assume that on 11/1, the NSC issues a PTAN to XYZ for the Main Street location.
- Between 8/1 and 11/1, XYZ can hold and accumulate claims for products provided to Medicare beneficiaries out of the Main Street facility.
- On 11/1, XYZ can submit all of the accumulated claims to Medicare, assuming that were no outstanding issues with the application and Medicare makes the Main Street facility’s PTAN retroactively effective back to 8/1.
ASSET PURCHASE - DME PTAN

- Assume that closing occurs on 8/1, but XYZ does not have its accreditation, licensure and surety bond until 9/1.
- Assume that on 9/1, XYZ submits a new Medicare form 855S for the Main Street facility. Assume that on 12/1, the NSC issues a PTAN to XYZ for the Main Street facility.
- The earliest that Medicare will make the Main Street facility’s PTAN effective is 9/1.
- XYZ will lose all of its Medicare claims accumulated between 8/1 and 9/1. Assuming that there were no other issues with the application, Medicare will likely make the Main Street facility’s PTAN effective on 9/1 and XYZ will be able to retroactively submit the claims it accumulates from 9/1 until 12/1.
Assume that XYZ has a location in the same city on Elm Street. Assume that XYZ has a PTAN for the Elm Street facility.

In order to avoid the “cash flow hit” arising from holding Medicare claims for the Main Street facility, the Main Street location can be operationally set up so that it will not provide products to Medicare patients until XYZ receives a PTAN for the Main Street location.

Until the Main Street facility receives its PTAN, the Elm Street facility can be operationally set up so that it can serve the Medicare patients that would normally be served at the Main Street facility.
QUESTIONS?
THANK YOU

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