Considerations For Selling a Practice - Integration vs. Independent

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I have no relevant financial relationships with commercial interests to disclose.
• If Physician does decide not to remain independent, then careful consideration should be given to sale of practice issues contained in this presentation.
1. Structure of Transaction For Sale of Practice

- Transaction is typically structured as stock purchase or asset purchase
- Both arrangements have advantages and disadvantages
Stock Purchase Transaction

- Transaction where buyer purchases shares or stock of physician practice
- All assets, receivables and liabilities are transferred to buyer
- Uninterrupted cash flow because contracts with third party payors remain intact
- Can assume existing provider numbers, licenses and contracts in most cases
- Buyer could be held responsible for future malpractice suits and other complaints not yet filed at the time of sale
Asset Purchase Transaction

- Transaction where buyer purchases certain designated assets of practice
- Liabilities can be excluded from transaction
- Purchase can include both tangible and intangible assets
- Buyer will have to obtain new provider number in most cases which may not be available on closing date
- Need permission to assign existing agreements of seller
- Buyer will not be responsible for any liabilities or overpayments due back to any payor due to buyer’s new provider number
2. Purchase of Assets

- More common to purchase assets rather than stock of physician practice
- Assets purchased in accordance with Asset Purchase Agreement
- Asset Purchase Agreement should address:
  - Acquired Assets
  - Excluded Assets
  - Purchase Price
  - Representations and Warranties of Buyer and Seller
  - Malpractice and Other Insurance
  - Consents
  - Financial Statements
  - Accounts Receivable
• Contracts
• Litigation
• Title to Assets
• Taxes
• Licenses and Permits
• Compliance with Laws
• Patient Records
• Labor and Employment Matters
• Environmental
• Indemnification
• Limitation on Liability
• Costs
• Governing Law
• Asset Purchase Agreement should address both tangible and intangible assets being purchased (i.e. goodwill, medical records, trade names)
• Valuation should be done by qualified independent third party appraiser to reflect fair market value
3. Restrictive Covenants

- Buyer may require seller to have restrictive covenant not to compete with buyer in certain defined restricted area
- Non-compete covenant must be reasonable in length of time and geographic scope
- Buyer may want liquidated damages clause that provides that any seller in violation of the non-compete covenant shall immediately pay to buyer certain amount of money
- If a practice has current employees, then review should be done of enforceability of any existing non-compete
• Non-compete covenant may be included as part of practice appraisal if economic effect can be reasonably estimated and it has a finite duration. (See Schulz v. Commissioner, 294 F.2d 52 (9th Cir. 1961), aff’g 235 (1960)

• 3 types of non-compete covenants to evaluate:
  • Between individual employee physician and the selling practice as physician’s employer
  • Between the individual selling physician and the buyer
  • Between the selling medical practice and the buyer

• Non-compete covenants can have varying terms and conditions
4. Employment

• Buyer may purchase practice and employ seller (usually occurs in hospital purchase of physician practice)
• Written employment agreement should set out terms of employment (i.e. restrictive covenant, benefits, compensation, productivity incentives)
• Employment of physician by buyer should meet Anti-Kickback Safe Harbor and Stark Law employment exception or fair market value exception
Asset purchase agreement should also address various practice employment issues:

- Continuation of employment
- ERISA
- Benefits
- Paid time off
- Vacation
- Seniority
- Drug testing
- Termination of certain employees
5. Fraud and Abuse

- Purchase should comply with fraud and abuse laws
- Purchase of physician practice should be fair market value (FMV)
- IRS defines FMV as:
  “the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buyer and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts.”
Stark law defines FMV as:

“The value in arms’ length transactions, consistent with the general market value means the price that the assets would bring as the result of a bona fide bargaining between well-informed buyers and sellers who are not otherwise in a position to generate business for the other party, on the date of the acquisition of the assets. Usually, the fair market price is the price at which bona fide sales have been consummated for assets of like type, quality, and quantity in a particular market at the time of the acquisition, where the price has not been determined in any manner that takes into account the volume or value of anticipated or actual Medicare/Medicaid Designated Health Services referrals (as defined below) by physicians of the Practice to the entity that employs them or to other related entities.”
• Anti-Kickback Statute defines FMV as:
  “where the price or compensation has not been determined in any manner that takes into account the volume or value of anticipated or actual referrals.”
• FMV should be a value that is commercially reasonable
• Arm’s length transaction
• Anti-Kickback concerns:
  • Seller purchasing practice as a source of referrals which can increase costs
  • Purchase of intangible assets (i.e. goodwill, noncompete, patient list, patient records) may be payment for referrals
6. Licenses

- Transfer or terminate
- DEA registration
  - Return to DEA
  - Destruction of controlled substances
  - Drug samples
  - Prescription pads
  - Retain narcotics ledger for 2 years
- Software licenses
- Business licenses
- Laboratory License (CLIA)
- Tax Identification Number
- OSHA
7. Medical Records

- Purchase of medical records
  - Sale may include an agreement that buyer will store and maintain all medical records and have unlimited access to such medical records
  - Seller may want to retain a right of access
  - All medical records should be documented prior to sale
  - Record retention requirements
• Value of medical records
  • Intangible asset v. tangible asset
  • Value may be cost to avoid copying charges for medical record transfer
  • Electronic health record system value
• Patient notification of transfer of medical records
QUESTIONS