

want to avoid the situation where, after closing, it discovers that a number of the pharmacy's customers are dissatisfied with the service provided by the pharmacy. A dissatisfied customer might register a complaint with a governmental agency or with a third party payer, which could trigger a review, audit or investigation. Likewise, if the pharmacy provides products to members of a managed care organization, a significant piece of business could be lost if the managed care organization cancels its contract.

Often, the purchaser will attempt to reduce the purchase price if the purchaser concludes there are uncertainties that might affect the value of the acquired pharmacy subsequent to closing. By addressing these issues prior to entering into negotiations with the purchaser, the pharmacy will be in the position to insist on the best purchase price possible.

### Stock Versus Asset Acquisition

When acquiring a pharmacy, the purchaser can either purchase the assets of the business or the stock of the owner of the pharmacy. Each type of purchase results its own unique set of benefits and drawbacks.

In an asset acquisition, as a general rule, the purchaser does not assume any liabilities of the seller except for the liabilities that the purchaser expressly agrees to assume. Most importantly, if the seller has engaged in prior fraudulent activities, then generally speaking, the government will not attempt to impose successor liability on the purchaser.

As a caveat, if the government concludes that the asset sale is, in reality, a "de facto merger," then it might attempt to impose successor liability on the purchaser. See Footnote 1 for the factors that point to a "de facto merger."

Medicare Part B supplier numbers are tied to tax identification numbers. In an asset acquisition of a pharmacy that has a DME operation, the acquired DME operation will be continued under a new tax ID number (the purchaser's tax ID number). If the purchaser moves the acquired DME operation to an existing DME location owned by the purchaser (for which the purchaser already has a supplier number), then there will be no requirement for the purchaser to apply for a new supplier number. However, as is often the case, if the acquired DME operation will be continued at the seller's old location, or at a different location, then the purchaser will need to apply for a new supplier number for that location. Before submitting an application for a new supplier number, the DME company must be accredited. In addition, the DME company must have a surety bond for each location that has a supplier number issued to it. It normally takes four to eight weeks to obtain a new supplier number from the National Supplier Clearinghouse ("NSC"). Normally, during the interim period, the purchaser can sell products and services out of the new location, can accrue the claims to be submitted at a later date, but cannot actually bill for the claims until the new supplier number is received. In short, the purchaser will experience a cash flow crunch. Unfortunately, the purchaser cannot bill for the products and services under the seller's old supplier number (because the seller is no longer conducting the DME operation) and the purchaser cannot bill under one of the purchaser's supplier numbers attached to a different location.

On the other hand, in a stock acquisition, the pharmacy and/or DME operation remains with the same corporation (the entity whose stock is sold) and the supplier number remains attached to the same tax ID number (the corporation whose stock is sold to the purchaser). Therefore, there is no break in billing and the purchaser does not experience a cash flow interruption. The downside is that if the selling corporation engaged in prior activities that result in an overpayment or a recoupment demand or in an allegation of fraud, then the selling corporation remains liable for the prior activities.

### Steps to Bring an Acquisition to Fruition

The purchaser and seller should take the following steps that will increase the chances that the acquisition will be consummated:

- The purchaser and seller should each employ an experienced transactional attorney and an experienced health care regulatory attorney.
- The purchaser and seller will initially execute a confidentiality/non-disclosure agreement. This will allow the seller to forward financial and other confidential data to the purchaser so that the purchaser can make a preliminary determination as to whether it wishes to follow through with the acquisition. Once the purchaser decides that it wishes to follow through with the acquisition, then the parties will sign a non-binding letter of intent. The letter of intent needs to be as detailed as possible and contain as many of the actual terms as possible that the parties believe will be included in the definitive agreement (either a Stock Purchase Agreement or Asset Purchase Agreement). The letter of intent may set out the date the definitive agreement will be executed and the date that closing will occur. When executing the letter of intent, the purchaser and the seller will have decided whether the acquisition is an asset acquisition or a stock acquisition.
- Between the time of execution of the letter of intent and the time of execution of the definitive agreement, the purchaser will conduct due diligence. In reviewing files, the purchaser will ascertain if the files contain the necessary documentation to submit claims and, equally as important, to ascertain if the files contain documents to support medical necessity in the event of a post payment audit.
- The seller and purchaser will then execute the definitive agreement. In so doing, the purchaser will desire to pay as little cash up front as possible and to pay as much of the purchase price on the back end as possible. Payment of the balance of the purchase price will be conditioned on the veracity of the seller's representations, and that no third party audits and/or government inquiries or investigations arise that will jeopardize the value of the acquired business. If problems do arise following closing, then the definitive agreement will give the purchaser the right to offset a portion of the purchase price (to be paid on the back end) against the damages to be sustained by the purchaser as a result of the unanticipated problems following closing. In short, the purchaser will retain as much of the purchase price as possible to pay for unanticipated problems that arise following closing. To use the time-honored phrase: "Possession is 9/10ths