

Pharmacy Transactions

Pharmacies are subject to a unique combination of legal, regulatory, and contractual requirements. Traditional documentation for corporate transactions is insufficient to address the unique context in which pharmacy transactions occur. The elements particular to pharmacy purchase and sale transactions, including the myriad of licensing, regulatory, and Pharmacy Benefit Manager (“PBM”) contract considerations require particularized attention, knowledge, and expertise.



Structuring the Pharmacy Transaction

In general, the purchase and sale of a business may be structured as an entity purchase in which the purchaser acquires the stock (in the case of a corporation) or membership interests or units (in the case of a limited liability company), or an asset purchase in which the purchaser forms a new entity or utilizes an existing entity to purchase the assets of the seller’s business. In most business acquisitions, the preferred structure is an asset purchase, which provides a level of protection for the buyer for liabilities of the seller incurred prior to the sale. However, when the business being purchased is a pharmacy, there are certain shortcomings to an asset purchase, including the need for the buyer to obtain a new pharmacy license, payer contracts, DEA registration, and various other credentials required to operate the pharmacy. Conversely, an entity purchase allows the buyer to enjoy many of the benefits of existing contracts, licenses, and accreditations, but exposes the purchaser to preclosing liabilities, including debt, audit, recoupment, and litigation risk. Typical stock transactions require funds to be placed in escrow to account for these pre-closing liabilities. However, in the pharmacy context, the specter of post-closing PBM audits coupled with direct and indirect remuneration (“DIR fees”), which can be several times greater than the actual purchase price, present a new level of risk profile to these types of transactions. Therefore, it is important to carefully weigh the risks and benefits of each type of acquisition in connection with the specific facts and circumstances of the transaction under consideration to maximize benefits and minimize risk to the extent possible, and to engage in a thorough level of due diligence regardless of the structure of the pharmacy transaction.

Change of Ownership Requirements for Pharmacies

Even when a transaction is structured as an entity purchase, there are legal and regulatory considerations that must be addressed. Each state has its own unique requirements for reporting a change in ownership of the licensed entity to the applicable licensing authority. Some states require 30-days notice prior to closing, which may require submission of the actual transactional documents prior to closing, while other states require post-closing notification of the change in control. Additionally, PBMs have their own unique notification and recredentialing requirements in PBM contracts that require strict adherence to avoid network interruption.



Unique Experience Representing Pharmacies in Transactions

The factors discussed on the previous page mandate a transactional attorney who understands the unique combination of licensing, regulatory, and legal considerations applicable to pharmacies, and is able to craft documents that address all of these factors. Frier Levitt has represented clients in pharmacy transactions that range from sales of distressed pharmacies to CVS and Walgreens, to several million dollar purchases by private equity investors, and all forms of transactions in between involving not only retail pharmacies, but also sterile and non-sterile compounding pharmacies. Frier Levitt has represented several different types of pharmacies providers, including retail, specialty, compounding, long-term care, etc. and is aware of the unique nature of their businesses, which is crucial as our knowledge and experience allows us to assist our clients in selecting the most suitable transaction model and navigating them through the complex deal process in an efficient and cost-effective manner.

Some of the legal guidance that we provide includes:

- **Strategic business planning.**
- **Creation and execution of due diligence process.** Our attorneys have unique backgrounds that are often necessary in the due diligence process. As part of due diligence, the acquiring entity desires to identify all financial and legal risks of the acquisition. Oftentimes, the risks in a pharmacy acquisition have nothing to do with traditional business principles, but rather are more connected to the unique attributes of the PBM relationships the pharmacy maintains. One such example is the specter of post-closing anticipated changes in reimbursement rates, inventory audits, recoupment of DIR fees, BER/GER clawbacks, and a business model that is not compliant with state law, federal law or the PBM manual. Our attorneys have helped private equity companies avoid bad deals and renegotiate terms as a result of our proprietary due diligence.
- **Formation of governance documents.** Once again, in the life sciences space, the corporate governing documents created by even the most excellent corporate attorneys for traditional corporate transactions are insufficient. Corporate governance documents in the life sciences industry require unique terms and conditions that reflect some of the principles and risks inherent in the space.
- **Drafting of transactional documents.** Whether you are a buyer or a seller of a pharmacy, the transaction documents require unique expertise. Frier Levitt attorneys have substantial experience understanding PBM relationships, relationships with HUB models involving prescription referrals, prescriber relationships, GPO and wholesaler relationships, data transactions, and manufacturer rebate arrangements. Each of these concepts and many more must be built into the transactional documents.
- **Assistance with acquiring funding.** Very often, traditional bankers will avoid lending into the pharmacy industry. An experienced healthcare and life sciences attorney can provide substantial guidance and due diligence assistance that can ease the underwriting process. Borrowers need to understand the unique relationships between a pharmacy and the various stakeholders in order to understand the risks of funding.
- **Post-Closing regulatory compliance.** As previously described, the acquiring entity is faced with a maze of state and federal regulatory laws that must be addressed in the post-closing days, months, and even years. Failure to comply with post-closing regulatory requirements can result in network termination by PBMs or other payers, as well as loss of license.
- **Change of ownership filings with licensing authorities and third-party payors.** The exposure of the acquiring entity is most notable in change of ownership issues. Acquiring entities face challenges from PBMs and State boards, as well as Medicare and Medicaid. It is critical to the transaction process for the acquiring entity to be aware of change of ownership processes and risks in order to complete the process.



How Frier Levitt Can Help Pharmacies with Buying, Selling, and Other Transactions

Our attorneys have worked exclusively in the healthcare industry for over 20 years and have the unique experience and specialized knowledge in understanding the elements of healthcare and life sciences transactions including the myriad of licensing and regulatory consideration, and the management of Pharmacy Benefit Manager ("PBM") contracts. Contact us to speak to an attorney in our Pharmacy Transactions Team.