BASS BERRY ✦ SIMS

Looking through the Scope: 5 Key Diligence Considerations When Buying a GI Practice

Private equity investors' interest in gastroenterology (GI) practices continues to remain strong, despite some headwinds that GI practices have experienced as a result of the COVID-19 pandemic and further investment in this sector is likely to continue. In addition to considering issues that are generally applicable to physician practice transactions, when investing in a GI practice, consider the following issues that are unique to GI practice acquisitions:

1. Ambulatory Surgery Centers (ASCs)

GI procedures such as colonoscopies and endoscopies are often performed in the outpatient setting at ASCs. Gastroenterologists may have ownership in an ASC, either individually or through their group practice or another entity. Investing in GI practices and the ASCs where they perform procedures increases the attractiveness of GI groups because of the efficiency of the ASC model and potential profitability. However, because gastroenterologists are referral sources to ASCs, their financial relationships with ASCs fall within the purview of the federal Anti-Kickback Statute (AKS) and similar state laws. As a result, any ASC relationships should be carefully vetted to ensure that the relationships fall within a safe harbor or otherwise presents a low risk. Vital to that analysis is whether GI physicians' purchases and sales of their ownership interest in the ASC were fair market value.

2. Related Anesthesiology Practice

In the last ten years, the use of general anesthesia or conscious sedation has become standard for many GI procedures. As a result, many GI practices and physicians have either brought anesthesia into their practices or established separate anesthesia practices. These arrangements, particularly separate anesthesia practices owned by GI physicians, have not been without regulatory controversy. In 2006, the Office of Inspector General (OIG) issued an advisory opinion (OIG Adv. Opin. 12-06) focused on surgeons profiting from anesthesia. As a result, it is important that investors understand and evaluate current anesthesia relationships and, because of successor liability, any such relationships that existed in the prior six years.

3. Pathology Services

Several GI practices also have pathology laboratories within their practice that perform or bill for pathology services, either just the technical or professional component of the services or both. The pathology specimens typically relate to biopsies taken during a procedure or surgery. With the evolution of digital pathology, these arrangements are evolving. In addition to analyzing these services for compliance with the federal Stark Law (e.g., group practice and in-office ancillary services exception) and the federal AKS, there are a variety of other regulatory and specific reimbursement considerations related to providing and billing for pathology services, such as the Medicare anti-markup rules and state direct billing laws.

4. Infusion Services

GI practices may also provide infusion services for patients with complex gastrointestinal issues. Infusion services are within the purview of the federal Stark Law, meaning these services must be structured to meet an appropriate Stark exception and the federal AKS. Typically, a pharmacy supplies the infusion drugs, creating a financial relationship between referral sources. Further, the reimbursement rules applicable to the infusion drugs and administration are complex. A thorough understanding of all the relevant requirements is important to be able to evaluate the practice's compliance.

5. Government Pay

As GI services are predominantly medically necessary for older adults, government program payments typically constitute a higher portion of the revenue of a GI practice as compared to other specialties. As a result, compliance is vitally important given the legal repayment obligations tied to government programs. Effectively, any compliance lapses may have a proportionally greater impact on the practice. A review of past compliance infrastructure and a thorough billing and coding audit will help investors (and their legal advisors) understand the risk of historic noncompliance.

Read our additional articles in the series about private equity investing in other healthcare sectors:

- Avoid a Wrinkle in your Dermatology Deal
- X-Ray the Radiology Practice Before You Buy It
- Spring Cleaning: Healthcare Private Equity Compliance Checklist
- Want to Buy an "-Ology"? Six Things to Know Before You Buy a Physician Practice
- The Philosophy for Investing in Urology: 5 Key Regulatory Risks
- Pros & Cons of Behavioral Health Sector Investing
- Believing in Conceiving: Private Equity's Rebirth in the Fertility Sector
- 10 Trends in Physician Practice Transactions to Track in 2020

About the Bass, Berry & Sims Healthcare Private Equity Team

The Healthcare Private Equity Team at Bass, Berry & Sims has advised in over 150 private equity transactions in the healthcare industry over the past two years, including The M&A Advisor's Healthcare & Life Sciences Deal of the Year (Over $1B) and Corporate/Strategic Deal of the Year (Over $1B) in 2020. The firm is ranked the #6 Most Active in Healthcare Private Equity Deals in Pitchbook's 2020 Global League Tables. As the third largest healthcare law firm in the U.S. (as ranked by American Health Law Association in 2020), with deep corporate and healthcare regulatory expertise, Bass, Berry & Sims has long been recognized as the go-to law firm for private equity funds investing in healthcare. To learn more about our team, industry experience and value-add, click here.

Authors

Angela Humphreys
(615) 742-7852
ahumphreys@bassberry.com

Tatjana Paterno
(615) 742-7928
tpaterno@bassberry.com

Danielle M. Sloane
(615) 742-7763
dsloane@bassberry.com

Nesrin Garan Tift
(615) 742-7861
ntift@bassberry.com