Telehealth Services Transactions: Establishing & Scaling

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Overview

- Scaling
- Key Questions
- Primary Models
- Potential Compensation Structures
- Regulatory Considerations
- Prescribing Controlled Substances
- Liability Considerations
- Fraud Cases

What do we mean by scaling?

- Expanding geographically
- Adding more patients/providers
- Adding products/services
- Building v. buying (we'll focus on building)

Key Questions

- Do you need a professional entity?
- Who will own the professional entity?
- If the owner is a physician, in which states is the physician licensed?
- In which states will the entity be doing business?
- What kind of services will be provided?
- Will the services include the provision of Durable Medical Equipment or other DHS?
- Will controlled substances be prescribed?
- Will the providers be located in a central location or located in each state where telemedicine will be provided?

Primary Models

- Physician-Owned Model
- Virtual/In-Person Hybrid
- MSO Model
  - Exclusive PC Network
  - Outsourced PC Network

Potential Compensation Structures

Management Services Compensation

There are a number of payment arrangements that an MSO can make with healthcare entities in regard to compensation for its services. Payment arrangements between an MSO and a practice include, but are not limited to:

(1) Fixed fee arrangements
(2) Cost-plus fees based on the services provided to the practice
(3) Portion of cost savings that the MSO helped the entity realize
(4) Percentage of an entity's revenues or profits (not often used due to regulatory restrictions)

Potential Compensation Structures

PC Provider Compensation

- Compensation to PC providers can take myriad forms (per encounter, call arrangement, salary, etc.), so long as:
    - The amount paid is consistent with Fair Market Value
    - The arrangement is Commercially Reasonable
    - The compensation does not fluctuate with the volume or value of referrals or include ancillaries
- **Fair Market Value:** “the value in arm’s-length transactions, consistent with the general market value (i.e., “With respect to for services, the that would be paid at the time the parties enter into the service as the result of bona fide bargaining between well-informed parties that are not otherwise in a position to generate business for each other.”
- **Commercially Reasonable:** “the particular arrangement furthers a legitimate business purpose of the parties to the arrangement and is sensible, considering the characteristics of the parties, including their size, type, scope, and specialty. An arrangement may be commercially reasonable even if it does not result in profit for one or more of the parties.”
- The arrangement should identify exactly what service(s) the provider is being compensated for

Potential Compensation Structures

Valuation Considerations

The three (3) general approaches for the valuation/appraisal of management services are:

(1) **Cost Approach:** The underlying theory of the Cost Approach is that a prudent buyer would not pay more for the services received than the cost of producing a substitute with the same utility. Cost Approach based methods seek an indication of value by determining the current cost of reproducing or replacing the services provided or received.

(2) **Market Approach:** The underlying theory of the Market Approach is that a prudent buyer has the ability to go to the marketplace and purchase similar services. Market Approach based methodology is premised on the foundation that reported prices of comparable services in the marketplace provide guidance to the value of the subject services.

(3) **Income Approach:** Income Approach based methods measure the present value of anticipated future economic benefits that will accrue to a party, or both parties, to a Services arrangement.

Regulatory Considerations

- Corporate
- Operational
- Technology
- Clinical
- Employment
- Compliance
- **Expiration of the PHE!

Corporate Issues

- Corporate Practice of Medicine
- Foreign registration
- Telemedicine registration

Operational Issues

- Call center/patient triage
- Policies and procedures
- Physician leadership

Technology Issues

- Privacy and Security (HIPAA and State Law)
- IP protection
- Tech licensing
- Synchronous v. Asynchronous Telecommunication Tools
- Vendor contracting
- TCPA

Clinical Issues

- Supervision Requirements
- Credentialing/Screening
- Scope of Practice and Licensing
- DEA/Board requirements for Tele-prescribing
- Physician-patient relationship in a virtual model
- Credentialing
- Clinical quality and oversight
- Direct to Consumer Lab and Pharmacy Fulfillment

Employment Issues

- FLSA wage and hour (overtime considerations)
- Telecommuting and applicable law
- Pay transparency
- EE v. IC
- Clinician Staffing

General Compliance

- Medicare compliance program requirements
- FWA
- TCPA
- Billing/reimbursement
- Marketing/Advertising

Liability Considerations

- Standard of Care/Malpractice
- Insurance
  - Professional Liability
  - Cyber/breach
  - Tech E&O

Fraud Cases

- Operation Rubber Stamp
  - Total charges and guilty pleas in 19 judicial districts involving over $4.5 billion in false billings from fraudulent telemedicine schemes for 86 criminal defendants
  - Follows 2019 "Operation Brace Yourself" involving $1 billion in fraudulent billings
  - Allegations include: (1) Executives paying providers to order unnecessary DME, diagnostic testing and pain meds (2) Limited or no patient interaction and (3) DME/labs/pharmacies purchased orders in exchange for kickbacks and bribes and submitted false claims to government payers

Fraud Cases

The July 2022 OIG Special Fraud Alert created a list of behaviors that should alert practitioners to potential fraud:

1. The telemedicine company identifies the patients.
2. The practitioner does not have enough contact or information about the patient to assess whether these items are medically necessary.
3. The telemedicine company pays the practitioner based on the volume of items prescribed to patients.
4. The telemedicine company provides services only to patients who are beneficiaries of federal healthcare programs.
5. The telemedicine company says they provide items and services to only nonfederal patients; however, they bill federal health care programs.
6. The telemedicine company only provides one type of health care product or service. This behavior can restrict practitioners' treatment options.

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Valuation of Telemedicine

HCC Authored Whitepaper

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