

Anti-Kickback Statute Compliance in Healthcare Transactions

Navigating Safe Harbors, Identifying Transactions That
Implicate AKS, Limiting Civil Monetary Penalty Exposure

THURSDAY, JULY 14, 2016

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Donald H. Romano, Of Counsel, **Foley & Lardner**, Washington, D.C.

J. Mark Waxman, Partner, **Foley & Lardner**, Boston

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The Ology Team

4.15. Compliance with Healthcare Laws.

4.15.1. Except as set forth on Schedule 4.15.1, no TOG Entity nor any director, officer, employee or agent of any TOG Entity, including any physician, physician's assistant or other clinical employee has (a) violated, conducted its business or operations in violation of, or used or occupied its properties or assets (including the Assets) in violation of any Healthcare Laws in any material respect, or (b) received any written notice of any alleged breach, violation of, default under or any citation for noncompliance with, any Healthcare Laws nor, to the Sellers' Knowledge, is there a basis which could constitute such a breach, violation, default or noncompliance.

4.15.2. Except as set forth on Schedule 4.15.2: (a) each TOG Entity and each professional employee, including any physician, physician's assistant or other applicable clinical employee has the requisite provider or supplier number(s) to bill the Medicare program, the respective Medicaid program in the state or states in which it operates, and all other Third Party Payor Programs that it currently bills, (b) no TOG Entity nor any professional employee or professional contractor thereof, including any physician, physician's assistant or other clinical employee or professional contractor has received any written notice that there is any investigation, audit, claim review, or other action pending or threatened that could result in a revocation, suspension, termination, probation, restriction, limitation, or non-renewal of any supplier or provider number of such TOG Entity, employee or contractor or result in such TOG Entity's or any of its location's, or such employee's or contractor's exclusion from any Third Party Payor Program; (c) all claims submitted by or on behalf of each TOG Entity or such TOG Entity's employees and contractors for items, services and goods provided to Third Party Payors Programs represent claims for medically necessary items, services or goods actually provided by such TOG Entity or its employees or contractors; (d) all claims that have been submitted by or on behalf of a TOG Entity or its employees or contractors have been submitted in material compliance with applicable Laws, including any Healthcare Laws, and all rules, regulations, agreements, policies, and procedures of the Third Party Payor Programs; (e) no TOG Entity nor any employee of any TOG Entity has received any written notice that there are any material pending or threatened, audits, investigations or claims for or relating to its claims; (f) Schedule 4.15.2 lists each current physician employee, physician assistant and other clinical employees and clinical contractors required to be licensed, certified and/or registered to perform services for the TOG Entities along with their respective state(s) of licensure, certification or registration (including the licensure, certification or registration number); all such licensures, certifications and registrations are valid and contain no restrictions and all such physician employees, physician assistants and clinical employees or contractors required to be licensed, certified or registered to perform services to the TOG Entities are so licensed, certified or registered without restriction; (g) TOG PC and TOG Surgery have current and valid provider contracts with the Third Party Payor Programs as set forth (or required to be set forth) on Schedule 4.15.2, and are in compliance in all material respects with the conditions of participation of the Medicare and Medicaid programs and the various agreements and conditions necessary for reimbursement under all other applicable Third Party Payor Programs; (h) all billing practices of the TOG Entities are and have been in material compliance with all applicable Healthcare Laws, regulations, agreements and policies of all applicable Third Party Payor Programs and the TOG Entities have not billed or received any payment or reimbursement in excess of amounts allowed by any Healthcare Law except to the extent any such amounts are immaterial and have been repaid in full as required by, and in compliance, with all applicable Healthcare Laws and Third Party Payor Program agreements; (i) no TOG Entity nor shareholder, member, officer, director or

employee or clinical contractor of any TOG Entity has been excluded, debarred or suspended from participation in either Medicare, Medicaid or any other state or federal health care program, nor is any such exclusion, debarment or suspension threatened; (j) based upon and in reliance upon the TOG Entities' review of (1) the "list of Excluded Individuals/Entities" on the website of the United States Health and Human Services Office of Inspector General (<http://oig.hhs.gov/fraud/exclusions.html>), and (2) the "List of Parties Excluded From Federal Procurement and Non-procurement Programs" on the website of the United States General Services Administration (<http://www.arnet.gov/epl/> and <https://www.sam.gov>), none of the shareholders, members, officers, directors, employees or clinical contractor of any TOG Entity has been excluded from participation in Medicare, Medicaid or any other state or federal health care program. No TOG Entity, nor any shareholder, member, officer, director or employee or clinical contractor of any TOG Entity has received any written notice from any Third Party Payor Programs of any pending or threatened investigations, audits, inquiries or surveys. Neither the execution of this Agreement nor the consummation of the transactions contemplated hereunder will result in the breach or default under, or grant the ability of the counterparty to terminate, any Third Party Payor Agreement listed (or required to be listed) on Schedule 4.15.2.

4.15.3. Each TOG Entity has been duly granted all Permits under all Healthcare Laws necessary for the conduct, in all material respects, of its respective business as currently conducted and the TOG Entities' lawful occupancy, use, and operation of the Real Property. Schedule 4.15.3 describes each such Permit. Except as set forth on Schedule 4.15.3, (a) such Permits are valid and in full force and effect, and (b) no TOG Entity is in breach or violation of, or default under, in any material respect, any such Permit, and, to the Sellers' Knowledge, no basis exists which, with notice or lapse of time or both, would constitute any such breach, violation nor default.

Entity University Health/XYZ

3.8 Medicare Participation/Accreditation. The Hospitals are qualified for participation in the Medicare, Medicaid and CHAMPUS/TRICARE programs, have current and valid provider contracts with such programs, are in compliance in all material respects with the conditions of participation in such programs, and have received all approvals or qualifications necessary for capital reimbursement for the Hospitals. The Hospitals are duly accredited, with no contingencies, by The Joint Commission ("TJC"). A copy of the most recent accreditation letters from TJC pertaining to the Hospitals have been made available to XYZ Sub. All billing practices of the ABC Entities with respect to the Facilities to all third party payors, including the Medicare, Medicaid and CHAMPUS/TRICARE programs and private insurance companies, have been in material compliance with all applicable laws, regulations and policies of such third party payors and the Medicare, Medicaid and CHAMPUS/TRICARE programs, and to the knowledge of ABC, no ABC Entity nor any Facility has billed or received any payment or reimbursement in excess of amounts allowed by applicable law. No ABC Entity has been excluded from participation in the Medicare, Medicaid or CHAMPUS/TRICARE programs, nor to ABC's knowledge is any such exclusion threatened. Based upon and in reliance upon the ABC Entities' review of (i) the "list of Excluded Individuals/Entities" on the website of the United States Health and Human Services Office of Inspector General (<http://oig.hhs.gov/fraud/exclusions.html>), and (ii) the "List of Parties Excluded From Federal Procurement and Nonprocurement Programs" on the website of the United States General Services Administration (<http://www.arnet.gov/epl/>), none of the officers, directors or managing employees of any ABC Entity has been excluded from participation in the Medicare, Medicaid or CHAMPUS/TRICARE programs. Except as set

forth in a writing delivered by ABC to XYZ Sub which specifically makes reference to this Section 3.8 or as set forth on Schedule 3.8, no ABC Entity has received any written notice from any of the Medicare, Medicaid or CHAMPUS/TRICARE programs, or any other third party payor programs of any pending or threatened investigations or surveys. Each ABC Entity required to be registered (each, for purposes of this paragraph, a "Registered Seller") has registered with My Quality Net (formerly QNet Exchange) and any other quality reporting data exchanges as required by The Centers for Medicare and Medicaid Services ("CMS") under its quality reporting programs (the "Quality Programs"). Each Registered Seller has submitted all quality data required under the Quality Programs to CMS or its agents, and all quality data required under the ORYX Core Measure Performance Measurement System ("ORYX") to TJC, for all reporting periods concluded prior to the date of this Agreement, except for any reporting period for which the respective reporting deadlines have not yet expired. All such submissions of quality data have been made in accordance with applicable reporting deadlines and in the form and manner required by CMS and TJC, respectively. The ABC Entities have made available to XYZ Sub the "validation results" for all reporting periods concluded prior to the date of this Agreement, except for any reporting period for which the respective reporting deadlines have not yet expired. No Registered Seller has received notice of any reduction in reimbursement under the Medicare program resulting from its failure to report quality data to CMS or its agent as required under the Quality Programs.

3.9 Regulatory Compliance. Except as set forth in a writing delivered by ABC to XYZ Sub which specifically makes reference to this Section 3.9 or as set forth on Schedule 3.9, the ABC Entities are in compliance in all material respects with all applicable statutes, rules, regulations, and requirements of the Government Entities having jurisdiction over the Facilities and the Assets. As used herein, "Government Entity" means any government or any agency, bureau, board, directorate, commission, court, department, official, political subdivision, tribunal or other instrumentality of any government, whether federal, state or local. Each ABC Entity has timely filed all reports, data, and other information required to be filed with the Government Entities. No ABC Entity nor any of its employees have committed a violation of federal or state laws regulating health care fraud, including but not limited to the federal Anti-Kickback Law, 42 U.S.C. §1320a-7b, the Stark I and II Laws, 42 U.S.C. §1395nn, as amended (the "Stark Law"), and the False Claims Act, 31 U.S.C. §3729, et seq. To the knowledge of ABC, the ABC Entities are in compliance in all material respects with the administrative simplification provisions required under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), including the electronic data interchange regulations and the health care privacy regulations, as of the applicable effective dates for such requirements.

3.27 Compliance Program. The ABC Entities have made available to XYZ Sub a copy of current compliance program materials related to the ABC Entities and the Facilities, including without limitation, all current program descriptions, compliance officer and committee descriptions, and, to the extent they exist, ethics and risk area policy materials, training and education materials, auditing and monitoring protocols, reporting mechanisms, and disciplinary policies. Except as set forth in a writing delivered by the ABC Entities to XYZ Sub which specifically makes reference to this Section 3.27 or to the extent set forth on Schedule 3.27, no ABC Entity (a) is party to any current, valid and binding Corporate Integrity

Agreement with the Office of Inspector General of the Department of Health and Human Services, (b) has any current reporting obligation pursuant to any Settlement Agreement entered into with any Government Entity, (c) to the ABC Entities' knowledge, has, at any time during the past five (5) years, been the subject of any Federal health care program investigation conducted by any federal or state enforcement agency, (d) to the ABC Entities' knowledge, has, at any time during the past five (5) years, been a defendant in any *qui tam*/False Claims Act litigation, (e) has, during the past five (5) years, been served with or received any search warrant, subpoena, civil investigative demand, or contact letter from any federal or state enforcement agency (except in connection with medical services provided to third-parties who may be defendants or the subject of investigation into conduct unrelated to the operation of the healthcare businesses conducted by the ABC Entities), and (f) has, during the past five (5) years, received any written complaints (or complaints through their compliance "hotline") from employees, independent contractors, vendors, physicians, or any other person that would indicate that any ABC Entity has violated any applicable law or regulation. Schedule 3.27 includes a description of each audit and investigation conducted by any ABC Entity pursuant to its compliance program during the last five (5) years. For purposes of this Agreement, the term "compliance program" refers to provider programs of the type described in the compliance guidance published by the Office of Inspector General of the Department of Health and Human Services.

The Coast

5.15. Compliance with Healthcare Laws.

5.15.1. Except as set forth on Schedule 5.15.1, no Team Company nor any director, officer, employee or agent of any Team Company, including any physician, physician's assistant or other clinical employee has (a) violated, conducted its business or operations in violation of, or used or occupied its properties or assets (including the Assets) in violation of any Healthcare Laws, or (b) received any written notice of any alleged breach, violation of, default under or any citation for noncompliance with, any Healthcare Laws nor is there a basis which could constitute such a breach, violation, default or noncompliance.

5.15.2. Except as set forth on Schedule 5.15.2: (a) each Team Company and each professional employee, including any physician, physician's assistant or other applicable clinical employee has the requisite provider or supplier number(s) to bill the Medicare program, the respective Medicaid program in the state or states in which it operates, and all other Third Party Payor Programs that it currently bills, (b) no Team Company nor any professional employee thereof, including any physician, physician's assistant or other clinical employee has received any written notice that there is any investigation, audit, claim review, or other action pending or threatened that could result in a revocation, suspension, termination, probation, restriction, limitation, or non-renewal of any supplier or provider number of such Team Company or employee or result in such Team Company's or any of its location's, or such employee's exclusion from any Third Party Payor Program; (c) all claims submitted by or on behalf of each Team Company or such Team Company's employees for items, services and goods provided to Third Party Payors Programs represent claims for items, services or goods actually provided by such Team Company or its employees; (d) all claims that have been submitted by or on behalf of a Team Company or its employees have been submitted in material compliance with applicable Laws and all rules, regulations, policies, and procedures of the Third Party Payor Programs; (e) no Team Company nor any employee of any Team Company has received any written notice that

there are any material pending or threatened, audits, investigations or claims for or relating to its claims; (f) Schedule 5.15.2 lists each current physician employee, physician assistant and other clinical employee required to be licensed, certified and/or registered to perform services for the Team Companies along with their respective state(s) of licensure, certification or registration (including the licensure, certification or registration number); all such licensures, certifications and registrations are valid and contain no restrictions and all such physician employees, physician assistants and clinical employees required to be licensed, certified or registered to perform services to the Team Companies are so licensed, certified or registered without restriction; (g) GCD PA has a current and valid provider contract with each Third Party Payor Program set forth on Schedule 5.15.2, and is in compliance in all material respects with the conditions of participation of the Medicare and Medicaid programs and the various conditions necessary for reimbursement under all other applicable Third Party Payor Programs; (h) all billing practices of the Team Companies are and have been in material compliance with all applicable Healthcare Laws, regulations and policies of all applicable Third Party Payor Programs and the Team Companies have not billed or received any payment or reimbursement in excess of amounts allowed by any Healthcare Law except to the extent any such amounts are immaterial and have been repaid in full as required by, and in compliance, with all applicable Healthcare Laws; (i) no Team Company nor shareholder, officer, director or employee of any Team Company has been excluded, debarred or suspended from participation in either Medicare, Medicaid or any other state or federal health care program, nor is any such exclusion, debarment or suspension threatened; (j) based upon and in reliance upon Sellers' review of (1) the "list of Excluded Individuals/Entities" on the website of the United States Health and Human Services Office of Inspector General (<http://oig.hhs.gov/fraud/exclusions.html>), and (2) the "List of Parties Excluded From Federal Procurement and Nonprocurement Programs" on the website of the United States General Services Administration (<http://www.arnet.gov/epls/> and <https://www.sam.gov>), none of the shareholders, officers, directors, employees of any Team Company has been excluded from participation in Medicare, Medicaid or any other state or federal health care program. No Team Company nor any shareholder, officer, director or employee of any Team Company has received any written notice from any Third Party Payor Programs of any pending or threatened investigations or surveys. Neither the execution of this Agreement nor the consummation of the transactions contemplated hereunder will result in the breach or default under, or the ability of the counterparty to terminate, any Third Party Payor Agreement listed at Schedule 5.15.2.

5.15.3. Each Team Company has been duly granted all Permits under all Healthcare Laws necessary for the conduct of the Business as currently conducted and the Team Companies' lawful occupancy, use, and operation of the Real Property. Schedule 5.15.3 describes each such Permit affecting, or relating to, the Assets or the Business together with the Governmental Authority or other Person responsible for issuing such Permit. Except for any Permits marked with an asterisk (*) on Schedule 5.15.3, (a) such Permits are valid and in full force and effect, (b) no Team Company is in breach or violation of, or default under, any such Permit, and, to Sellers' Knowledge, no basis exists which, with notice or lapse of time or both, would constitute any such breach, violation nor default and (c) such Permits will continue to be valid and in full force and effect, on substantially identical terms, following the consummation of the Contemplated Transactions.