McGUIREWOODS

www.mcguirewoods.com

Key Legal Issues and Legal Compliance Boot Camp – The Core Elements of a Successful Compliance Plan

Presented by:
Scott Becker, Partner
Amber Walsh, Partner
Elaine Gilmer, Associate
18th Annual ASC Conference
October 29, 2011

CONFIDENTIAL

McGUIREWOODS

Health Care

Key Legal Issues and Legal Compliance Boot Camp – The Core Elements of a Successful Compliance Plan

1. More uncertainty than at any time in 10 years - - ASCs and Healthcare
   - A. Will healthcare all be vertically integrated and system owned?
   - B. Independent versus employed physicians – Will reduced reimbursement of professional fees drive employment?
   - C. Are entrepreneurial doctors on the decline?
   - D. Increased competition for limited physicians
     - i. 100,000 doctors
     - ii. 5,300 to 6,000 ASCs
     - iii. 80% of doctors with hospital financial relationships
2. ASC Market Remains a Focus of Several Private Equity Funds and of many Hospitals and Health Systems
   - A. Health Systems with new ASC Strategies – Cluster strategies – 5 to 7 in a broader market – An alternative to physician employment
   - B. Private Equity funds remain hungry for ASC Chains

CONFIDENTIAL

McGUIREWOODS

Health Care

Key Legal Issues and Legal Compliance Boot Camp – The Core Elements of a Successful Compliance Plan

3. Headwinds
   - A. Cases – Independent Doctors – market by market, specialty by specialty
   - B. Reimbursement
     - i. Out of Network – See Exhibit C
     - ii. General Negative Trends
   - C. High deductible plans
   - D. Unemployment

CONFIDENTIAL

McGUIREWOODS
Health Care

Key Legal Issues and Legal Compliance Boot Camp – The Core Elements of a Successful Compliance Plan

4. 6 Best Specialties
   1. Orthopedics
   2. Spine
   3. GI
   4. ENT
   5. Ophthalmology
   6. Pain

CONFIDENTIAL

McGUIREWOODS
Health Care

Key Legal Issues and Legal Compliance Boot Camp – The Core Elements of a Successful Compliance Plan

5. 3 Biggest Challenges
   1. Payor Issues
   2. Doctor Employment and Doctor Recruitment
   3. Increased CMS and State Regulations
6. The Turn Around Market – Harder to Turn Around
7. Co Management – 100% deals
   1. What will be paid?
   2. Are there real roles?
   3. Do you need management to manage the co-managers?

CONFIDENTIAL

McGUIREWOODS
Health Care

Key Legal Issues and Legal Compliance Boot Camp – The Core Elements of a Successful Compliance Plan

8. Unprecedented increase in Government Investigations
   1. $2mm returns $17.3mm
   2. $4 Billion in 2010; $7 BB over two years
   3. Estimated 3 to 10% of total spent is misplaced
   4. Increased focus on Physician Hospital and Provider Relationships
   5. Increased number of qui tam cases
   6. $2.4 BB qui tam 2009, $1.6 BB for healthcare

CONFIDENTIAL

McGUIREWOODS
Health Care

Key Legal Issues and Legal Compliance Boot Camp – The Core Elements of a Successful Compliance Plan

9. Compliance Efforts Must Include
   1. Culture of Compliance
   2. Education
   3. Audit/Monitoring
   4. See Exhibit A
   5. See Exhibit B
10. Safe Harbor
   1. Increased litigation over redemption
   2. Need consistency
   3. Cure Period
   4. Offer Non Adverse
   5. Freeze out mergers questionable
      a. Fundamental Fairness
      b. Fair Market Value
   6. Waivers – Double Edged Sword

CONFIDENTIAL 7

McGUIREWOODS
Health Care

Key Legal Issues and Legal Compliance Boot Camp – The Core Elements of a Successful Compliance Plan

11. Non Competes
   1. Employment by Hospital – Next Great Frontier in non compete fights
   2. Practice vs. ASC
   3. States differ substantially in enforceability

CONFIDENTIAL 8

McGUIREWOODS
Health Care

Key Legal Issues and Legal Compliance Boot Camp – The Core Elements of a Successful Compliance Plan

Exhibit A

Review - Physician Relationships

1. Physician Hospital – 13 Key
   1. Is the relationship truly needed? E.g., is a medical director necessary for the position? What value will this position add? Has the position been manufactured as an excuse to provide compensation to physicians?
   2. Is the position and payment wholly unrelated to referrals or the intent to retain business? If any one purpose of a payment is in exchange for referrals, it can be deemed unlawful.
   3. How comparable is the position to other positions in the hospital when it comes to specialties of lower financial value? I.e., is a position only funded because it relates to high value or volume specialties?
   4. How comparable is the position to those at competing hospitals?
   5. Is the payment fair market value? If so, what evidence supports this? Is there a third party valuation or objective, external evidence to defend this value?
   6. Has the relationship between the hospital and the physician been approved by internal parties who are unrelated to the outside parties involved? I.e., is the physician who will receive such payment not part of the committee or board receiving such payment?

CONFIDENTIAL 9

McGUIREWOODS
Health Care

Key Legal Issues and Legal Compliance Boot Camp – The Core Elements of a Successful Compliance Plan

Review - Physician Relationships

1. Physician Hospital – 13 Key
   7. Does the relationship meet a Stark Act exception and an anti-kickback safe harbor? If a non-employment arrangement, is the relationship set to pay a fixed aggregate amount per year and not vary per the year? Many safe harbors require that aggregate payments be set in advance.
   8. Can a rebuttable presumption under the Internal Revenue Code be obtained that the relationship doesn't create private inurement or excess benefit?
   9. Has the hospital's compliance officer, or legal counsel, approved the relationship?
   10. Is there a contracting file with legal and valuation approval? Has there been a comprehensive and detailed review of legal concerns?
   11. Will the relationship be viewed in the context of an organization that has a culture of compliance?
   12. Is there a short memo that supports the true need for the relationship?
   13. Can this relationship be considered standard for the system, or is it highly creative and unusual?

CONFIDENTIAL

McGUIREWOODS
Health Care

Key Legal Issues and Legal Compliance Boot Camp – The Core Elements of a Successful Compliance Plan – Exhibit B

Core Elements of Compliance Plan Implementation

Several core concepts can be readily implemented by surgery centers, hospitals, surgical hospitals and other health care companies to substantially enhance legal compliance*. These include the following:

1. Hold meetings for all staff and employees at least one to two times per year to discuss compliance objectives and issues and to educate the group as to the importance of legal compliance. This can be by teleconference or as a session at any company meeting.
2. Periodic distribution (e.g., four to six times per year) of compliance literature, articles, and other materials to employees to continue to educate and heighten the awareness of compliance concerns.
3. Perform a billing review at least once to twice per year, particularly to review billing practices for compliance. Typically, this is done by an independent third party.
4. Perform a legal review of all contracts and other legally significant documents to assess legal compliance at least once to twice per year.
5. Update and distribute a company compliance plan regularly. The company should have a basic compliance plan which is distributed to all employees and is signed and acknowledged by all employees. The compliance plan should also be updated at least once a year to account for any changes in the regulatory environment and should be re-acknowledged by employees in writing when significant changes are made.

CONFIDENTIAL

McGUIREWOODS
Health Care

Key Legal Issues and Legal Compliance Boot Camp – The Core Elements of a Successful Compliance Plan –

Exhibit B

Core Elements of Compliance Plan Implementation

6. Key employees should attend periodic teleconferences and seminars related to compliance and other issues so as to better enhance their understanding of compliance concerns. This may also specifically include particular department heads that have a responsibility for certain efforts. For example, marketing professionals and billing professionals may specifically be required to attend seminars and educational efforts relating to their departments.
7. All employees, upon hiring, should receive initial compliance training, and there should be several follow-up seminars to heighten awareness and reinforce the company's commitment to compliance efforts.
8. All employees should be checked against the Medicare/Medicaid cumulative sanctions report.
9. The company should retain all business records and documentation for at least five years.
10. The company should communicate its intent to investigate aggressively any suspected problems regarding compliance.
11. The company should distribute a number to all employees to call to report any compliance concerns.
12. Wall certificates and handouts should be used to inform employees and customers of whom to call and alert relative to compliance issues.

CONFIDENTIAL

McGUIREWOODS
Health Care

Key Legal Issues and Legal Compliance Boot Camp – The Core Elements of a Successful Compliance Plan -

Exhibit C

Out of Network

1. Increased payor focus
   a) Recoup
   b) No pay
   c) Other
   d) Some markets may be better than others – the more disparate a market is and/or the more a payor abused by hospital pricing; often the better for out of network
2. Disclosure to Payor
   a. Reduce Fraud risk
   b. Double edged sword
   c. Review state law and cases
   d. Reduce to in-network; estimate matching

CONFIDENTIAL