



ARMSTRONG TEASDALE LLP

OCTOBER/NOVEMBER 2006

## SENN MEULEMANS ATTORNEYS JOIN ARMSTRONG TEASDALE

The attorneys of Senn Meulemans LLP, a San Francisco based law firm, have joined Armstrong Teasdale LLP. This establishes Armstrong Teasdale's West Coast presence with new offices in San Francisco and Reno and enhances the firm's capabilities in Las Vegas.

Kevin J. Senn, Catherine S. Meulemans and Richard G. Campbell, Jr. joined Armstrong Teasdale as partners, along with three of counsel and three associates.

The San Francisco, Reno and Las Vegas offices will concentrate in the areas of business and commercial litigation, construction, real estate and development, intellectual property, and corporate law and finance.

The American Bar Association recently published a book entitled *Biotechnology and the Law*. The book was written to help lawyers with the challenge of identifying the legal issues and processes that their clients must face when building, marketing, and protecting a biotech business. Andrew T. Hoyne, Mark L. Stoneman and Steven E. Pozaric of Armstrong Teasdale authored Chapter 3 on "Company Formation." For more information on the book, please visit [www.abanet.org/scitech/](http://www.abanet.org/scitech/).

## PRACTICE AREA FOCUS: ENVIRONMENTAL

The Environmental Practice Area focuses in all areas of environmental and occupational safety and health law. This includes the following:

- counseling clients in meeting regulatory responsibilities;
- negotiating with and litigating against federal, state and local governments concerning the scope of clients' obligations;
- litigating against private parties where clean-up costs are in issue;
- litigating against private parties for property damage and personal injuries due to alleged exposure to substances;
- mergers, acquisitions, leases, lending, insurance and litigation resulting from these relationships, and
- implementing innovative financial tools to remove the environmental risk from real estate transactions.

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In 2001, the Environmental Practice Area's substantial work in the area of designing innovative financial solutions to environmental risk led to the creation of AT Environmental, LLC. This consulting firm designs site specific insurance programs to facilitate Brownfield redevelopment, balance sheet management, and settle complex claims. George von Stamwitz serves as President, and has earned an international reputation in this growing area.

Recent highlights of the Environmental Practice Area include:

- Counsel for a group of 42 companies at a Superfund site in the Midwest involving: (1) clean up of facility; (2) litigating objections to a consent decree filed by non-settling parties; (3) obtaining mixed funding from the United States Environmental Protection Agency for EPA's clean up contribution; and (4) allocation and insurance litigation.
- Counsel for defendants/developers in environmental citizens' suits.
- Counsel for company sued by the United States and State of Missouri for contamination at Times Beach dioxin site in Missouri.
- Counsel in an appeal of denial by Missouri Department of Natural Resources of a construction permit for a \$200 million power plant. *Kinder Morgan v. MDNR*.
- Counsel for industry in thousands of asbestos and PCB toxic tort cases.
- George von Stamwitz, Edwin Noel, and Frank Pellegrini are listed in *the Best Lawyers in America (2007)* for environmental law.
- Roger Walker serves as Executive Director of the Regulatory Environmental Group for Missouri (REGFORM), a business association that works closely with MDNR and EPA on permitting issues, negotiated rulemaking, guidance documents and other environmental matters.
- Two of our attorneys have served as counsel for industry in hundreds of contested OSHA cases throughout the country, including the trial of OSHA willful citations.
- Counsel to publicly traded company in environmental claims filed against predecessors resulting in multi-million dollar settlement.
- Counsel to publicly traded company performing clean-up under Unilateral Administrative Order at a federal facility.
- Counsel to landowner PRP in multi-year RI/FS and several CERCLA cost recovery actions in Sauget, Illinois.
- Counsel to Illinois smelter facility in DOJ Clean Air Act enforcement matter.
- Department attorneys have authored the *Missouri Environmental Law Handbook, 4th Edition*, published by Government Institutes, Inc. and the *Environmental Insider*, a newsletter published by Associated Industries of Missouri.

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## HEALTH CARE

### Anti-Kickback Statute GPO Safe Harbor

*Piran Farhadieh*

The Anti-Kickback Statute ("AKS"), 42 U.S.C. § 1320a-7b, prohibits anyone from purposefully offering, paying, soliciting, or receiving anything of value for the purpose of inducing referrals for items or services payable by any federal health care program. A number of regulatory "safe harbors" create narrowly defined exceptions to the statute's prohibitions for certain arrangements that pose a minimal risk of fraud or abuse. Arrangements that meet a safe harbor will be deemed by regulators to be in compliance with the Anti-Kickback Statute.

The following is a general summary of the Anti-Kickback Statute Group Purchasing Organization ("GPO") Safe Harbor and its application. Consideration should be given to the actual facts and circumstances of any particular situation, which specific facts and circumstances may affect the general summary set forth below.

## Background

Historically, the purpose of GPOs was to use the combined purchasing power of its member hospitals in order to negotiate significant discounts from manufacturers and distributors of medical supplies. The theory is that by using the system of bulk purchasing through GPO contracts, member hospitals and other health care providers save money by eliminating duplicative transaction costs. To promote the growth of GPOs and assist hospitals in better negotiating with suppliers to obtain discounts, Congress, in 1986, sanctioned the GPO model for health care programs by exempting supplier-paid administrative fees from the Anti-Kickback Statute. These administrative fees represent the bulk of a GPO's revenue and, therefore, protection of these arrangements under AKS has become critical to a GPO's financial survival. Without the GPO safe harbor, these payments, whether described as administrative fees, marketing fees or otherwise, would clearly implicate the Anti-Kickback Statute and, unless structured in a manner to meet the requirements of another available safe harbor (such as a rebate program under the discount safe harbor), would be difficult to defend.

## Recent Developments

Recently, however, Congress, and specifically Senator Herb Kohl of Wisconsin, has been conducting investigations into GPO practices and whether the GPO safe harbor should be repealed. The Medical Device Manufacturers Association supports Senator Kohl in his position of repealing the GPO safe harbor. Arguments that GPOs stifle competition and receive cash value much greater than their operating costs have fueled the recent debates. The Congressional hearings and investigations continue today, but it is unclear as to how this issue will ultimately be resolved. Many are speculating that the GPO safe harbor will not be repealed, but rather modified to encourage competition and more direct contractual relationships with suppliers. The recent Congressional and regulatory focus on the GPO safe harbor emphasizes the importance of carefully evaluating any proposed transaction involving the payment of “administrative fees” or “marketing fees” in connection with the acquisition of medical capital equipment or other goods and services to ensure that the transaction fits within the requirements of an available AKS safe harbor.

## GPO AKS Safe Harbor

The GPO safe harbor protects (under certain circumstances) administrative fees paid by a supplier to a GPO in connection with the acquisition of medical capital equipment or other goods and services by the GPO’s members. The requirements of the GPO safe harbor include:

- The GPO administrative fee must be paid as part of an agreement to furnish goods or services to the group of individuals or entities for which the GPO is the authorized agent.
  - The GPO must have a written agreement with each individual or entity that will purchase items or services from the vendor.
  - The agreement must provide that participating suppliers from which the member will purchase goods or services will pay a fee to the GPO of three percent (3%) or less of the purchase price of the goods or services provided by that supplier; provided, however, that in the event the fee paid to the GPO is not fixed at three percent or less of the purchase price of the goods or services, the agreement must specify the amount (or if not known, the maximum amount) each supplier will pay to the GPO (where such amount may be a fixed sum or a fixed percentage of the value of purchases made from the supplier by the members under the agreement between the supplier and the GPO).
- Where the entity that receives goods or services from the vendor is a health care provider of services, the GPO must disclose in writing to the entity at least annually, and to the Secretary of the Department of Health and Human Services upon request, the amount received from each vendor with respect to purchases made by or on behalf of the entity.

Although the GPO safe harbor is designed to protect administrative fees paid by a supplier to a GPO, it contains certain requirements concerning the permissible structure of a GPO and its arrangements with members. For purposes of the safe harbor, a GPO is defined as an entity authorized to act as a purchasing agent for a group of individuals or entities (e.g. member hospitals), which member hospitals are:

- furnishing services for which payment may be made in whole or in part under Medicare or a state health care program and
- (i) not wholly owned by the GPO and (ii) not subsidiaries of a parent corporation that wholly owns the GPO (either directly or through another wholly owned entity).

## Further Analysis of Permissible Ownership Structures

Much of the GPO safe harbor is fairly straight forward and easily understood, but as large health care entities or groups seek to establish their own “captive” purchasing arms for their own hospitals and providers and to defray the cost of these purchasing arms with vendor paid “administrative fees” further analysis of the permissible ownership structures under the GPO safe harbor is required.

Certainly health care groups can contract directly or indirectly through subsidiaries (effectively acting as a purchasing agent) with a supplier for the provision of goods and services to the group’s hospitals without implicating AKS. However, once separate consideration is proposed to be paid to any such purchasing agent, in the form of administrative fees or otherwise, AKS is implicated because such additional fees can be characterized as an improper inducement to purchase. If the purchasing agent is within the same corporate umbrella as the purchasing hospital or provider, such inducement can be characterized as flowing directly to the purchaser. Hence, the rationale behind the GPO safe harbor is not solely based upon the purpose and use of the administrative fees (i.e. to cover the costs of a value-added purchasing/contracting function), but is also dependant upon who the fees are paid to and their relationship to the ultimate purchasers.

## SECURITIES

### Overview of Securities Law Developments

*Jill Newbold*

This summer, the SEC adopted revised rules regarding executive compensation and other corporate governance disclosure that affect all public companies. Also this summer, the Nasdaq Stock Market introduced a new market tier—the Global Select Market—and changed the market designation of all Nasdaq-listed companies. During the past few months, the securities practice group has been working with public company clients to implement these changes and ensure timely compliance with the new rules.

#### Revised Executive Compensation and Corporate Governance Disclosure Rules

On July 26, 2006, the SEC adopted final rules revising the disclosure requirements for executive and director compensation, related party transactions, director independence, executive compensation arrangements and other matters. These new rules revise the disclosure required in proxy statements, annual reports and registration statements. Furthermore, the SEC revised the Form 8-K rules to clarify the reporting of executive compensation arrangements.

Most significantly, the SEC revised the rules providing for tabular and narrative disclosure of compensation for companies' named executive officers. For example, companies must now include a Compensation Discussion and Analysis section in proxy statements, which must address the objectives, implementation measures and factors underlying each component of executive compensation. In addition, some of the existing compensation tables have been revised, while others have been replaced by new tables requiring the disclosure of forms of compensation that have not historically been reported.

In connection with its revisions to the executive compensation disclosure rules, the SEC also amended the rules requiring disclosure of related-party transactions and corporate governance information. For instance, the dollar threshold for the disclosure of related-party transactions has been increased from \$60,000 to \$120,000. Furthermore, companies must now include more detailed disclosure about director independence, director compensation and the decision-making processes of their compensation committees.

Companies must comply with the new disclosure requirements in proxy statements and registration statements during fiscal years ending on or after December 15, 2006, and in annual reports for fiscal years ending on or after December 15, 2006. As such, many public companies have begun to prepare for compliance with these new rules by their next proxy season. Companies are encouraged to begin compiling the numerical data required to be disclosed in the compensation tables and hold meetings with management and members of the compensation committees to begin contemplating and drafting the new narrative disclosure. For more details about the adopted rules and information on what companies can do now to prepare for compliance, please see the Securities Practice Group Client Alerts issued May 30, 2006 and August 18, 2006, available at <http://www.armstrongteasdale.com/News-Publications/ClientAlerts/index.php>.

#### Nasdaq Launches New Market Tier and Becomes National Securities Exchange

As noted above, the Nasdaq Stock Market introduced a three tier market system in July 2006, consisting of (i) the Nasdaq Capital Market (f/k/a the Nasdaq SmallCap Market); (ii) the Nasdaq Global Market (f/k/a the Nasdaq National Market); and (iii) the newly-created Nasdaq Global Select Market. The Global Select market has the highest listing standards of Nasdaq's three tiers, as measured by market value, liquidity and earnings.

In connection with the creation of a third market tier, the SEC also approved Nasdaq's conversion from an interdealer quotation system to a national securities exchange. After this conversion, Nasdaq-listed companies became registered under Section 12(b) of the Securities Act, rather than Section 12(g).

For more information regarding Nasdaq's new market tiers and Nasdaq's status as a national securities exchange, please see the Securities Practice Group Client Alert issued on August 4, 2006, available at <http://www.armstrongteasdale.com/News-Publications/ClientAlerts/index.php>.

Corporate reorganizations can often be effected tax free under the Internal Revenue Code. Consider a corporation with two businesses with the shareholders in two camps, who, for whatever reason, not want to do business together anymore. A possible solution to their problem, the split-off, is a classic reorganization. In a split-off, the corporation creates a subsidiary and transfers one of the businesses to the subsidiary. One of the camps of shareholders transfers all its shares in the parent to the parent in exchange for all of the stock in the subsidiary. After the dust settles, there are two corporations (old and new) separately owned by the two camps, each corporation holding one of the businesses. The fair question is how much cash can be transferred to the new corporation along with the real business. The Tax Increase Prevention and Reconciliation Act of 2005 provides an extraordinary answer. For the one-year period beginning after May 17, 2006, the amount of cash may be three-

quarters of the assets transferred (the real business being the remaining fourth). One year after that date, the percentages adjust to two-thirds cash, one-third real business. (Which could amount to a lot of cash if the real business has any worth.)

**Make some assumptions:**

- (1) that the basis of the assets in the split-off business is low but that such assets have greatly appreciated in value;
- (2) that the basis of the departing shareholders in the stock of the old corporation is low; and
- (3) that the split-off assets are sold by the new corporation.

The new corporation will have to pay tax on the sale of such assets, but the departing shareholders do not have to pay tax on the shares which they have shed, nor does the old corporation have to pay taxes on the transfer of the highly appreciated

assets, all because the original split-off was a tax free reorganization. In short, a great deal of cash and highly appreciated assets have changed hands tax free.

**Some caveats:**

The departing shareholders cannot compel the new corporation to sell the split-off assets immediately because the logic underlying the reorganization provisions is that the split-off business will continue to be held by the departing shareholders, (i.e., business as usual, just in a new corporation). There is, however, no specific time requirement under the Internal Revenue Code or other authority for holding the split-off assets. In addition, both businesses must have been held by the old corporation for five years. There are other requirements for tax free reorganizations, but if they are met, a great deal of cash and valuable assets can change hands, as said, tax free.

## IN-HOUSE MONTHLY CLE PROGRAMS

### Upcoming Presentations and Programs

Armstrong Teasdale CLE programs are held on the fourth Thursday of each month at 11:45 a.m. in the training room on the 8<sup>th</sup> floor.

**January 25, 2007**

Bob Jackson, "Choice of Entity"

**February 22, 2007**

Jay Summerville, "ALAS Update"

### Recent Presentations and Programs

**July 27, 2006**

Marty Hereford, "Immigration Issues"

**August 24, 2006**

Jonathan Igoe and John Dooling, "Trust and Estates Overview and Update"

**September 28, 2006**

Tom Bradshaw and Jim Martin, "White Collar Crime"

**November 16, 2006**

Jarrold Sharp, Mike Wazlawek, and Jennifer Simmons, "Introduction to Lending and Tools of the Trade for Non-Practitioners"

To view the PowerPoint slides from past CLE presentations, go to the training and development section on the Intranet.

If you have any questions regarding this material, please do not hesitate to call your regular Armstrong Teasdale contact or any of the Practice Area Leaders noted on the first page.

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