

Critical Issues for the Board's Compliance Committee

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A series of important new regulatory, judicial, and enforcement developments combine to present significant challenges for the hospital/health system compliance committee. These developments reflect the increasing enforcement focus of the government on the healthcare sector, the risk posed by whistleblower-based claims, and much greater attention to the effectiveness of compliance programs and their oversight committees.

While the resulting challenges are, individually and collectively, of great significance, they are certainly capable of being addressed by attentive, informed governing boards.

The responsibility to address these issues is grounded in the board's fundamental duty of care, which is interpreted to include the obligation to ensure that the organization maintains an effective corporate compliance program (the so-called "Caremark" duty). With the increased emphasis on preventing health-care fraud, greater expectations are being placed on the role and importance of the board's compliance committee in ensuring program effectiveness. These expectations extend whether "compliance" is a separate committee or is combined within the charter of another board committee (e.g., the audit committee).

As a result, the compliance committee's future agenda should include responding to the following:

- **Prominent penalties/verdicts:**

The compliance committee should have a general awareness of recent fraud and abuse cases and False Claims Act settlements that have resulted in hospitals and health systems making substantial payments to resolve allegations. These include the prominent Tuomey and Halifax False Claims Act litigation, as well as three recent False Claims Act settlements. To varying degrees in these cases and settlements, the Department of Justice (DOJ) appears to have advanced the highly controversial theory that the Stark law is violated when a hospital or health system pays employed physicians more than the net professional income the physician generates. The compliance committee should ask the general counsel to keep it updated on the implications of

these and similar enforcement developments.

- **Yates Memo:** The committee should also be aware of new DOJ enforcement guidelines that reflect both a) a substantially increased focus on individual accountability for corporate wrongdoing, both civil and criminal, and b) the importance of corporate cooperation in the context of governmental investigations. Under this new policy, civil and criminal prosecutors are directed to concentrate on individual wrongdoing from the inception of the investigation. These new guidelines will apply to individual conduct arising from, among other examples, actions instituted under the False Claims Act and anti-kick-back laws.

Related to the government's focus on compliance program effectiveness is the increasing focus on the qualifications and expertise of compliance committee members. The DOJ has expressed a concern that program effectiveness is dependent in part on the presence of competent, qualified, and disinterested compliance committee members to provide good faith oversight.

- **New compliance program metrics:** The DOJ is making a major commitment to evaluating the effectiveness of corporate compliance programs at organizations it investigates. Significantly, the DOJ has hired a former

Key Board Takeaways

The responsibilities of the board's audit and compliance committee are greater than ever. This is due in part to increased whistleblower activity and government enforcement, the new government focus on individual accountability for corporate malfeasance, and new government metrics used to evaluate compliance program effectiveness. Audit and compliance committee members should adjust their agenda to meet these new challenges, and consider the following action items:

1. Reevaluate the frequency and duration of committee meetings.
2. Evaluate the proper degree of coordination with other committees.
3. Pursue additional internal education initiatives.
4. Review the efficiency of existing reporting relationships.
5. Oversee efforts to compare the existing compliance program against the DOJ's new metrics, and to make changes where appropriate.

prosecutor and corporate counsel to serve as a full-time compliance expert. A primary duty of this new officer is to help determine whether corporations subject to DOJ investigation have maintained a good faith compliance program. Along the same lines, the DOJ is refining and expanding the types of metrics it applies when examining a compliance program. The compliance committee will most certainly want to evaluate the application of these new metrics to its own program.

- **Compliance committee composition:** Related to the government's focus on compliance program effectiveness is the increasing focus on the qualifications and expertise of compliance committee members. The DOJ in particular has expressed a concern that program effectiveness is dependent in part on the presence of competent, qualified, and disinterested compliance committee members to provide good faith oversight. A similar, new area of governance attention is on the qualifications of the chief compliance officer and whether those qualifications are appropriate given the size and complexity of the organization.
- **Compliance and legal integration:** The compliance committee must also respond to increasing focus (and, to a certain extent, controversy) on the

integration and coordination of the roles of the general counsel, compliance officer, and internal auditor. The committee will be expected to focus on the proper, clear articulation of the responsibilities and duties of these key officials, their various upstream reporting relationships, and the extent to which they should coordinate the performance of their duties under the committee's overall supervision. Along the same lines, the committee should be sensitive to compliance officer concerns (whether real or projected) about increasing scrutiny for their actions or non-actions from government agencies.

Action Items

The compliance committee may wish to consider the following action items going forward to address these and other pressing developments.

First, reevaluate whether the frequency and duration of committee meetings is satisfactory to allow the committee members to devote sufficient time and energy to these issues. Where compliance does not constitute the entire committee charter focus (e.g., as in an audit

and compliance committee), the question is whether sufficient agenda time is devoted to compliance matters (as opposed to, e.g., audit matters).

Second, evaluate the proper degree of coordination with other committees whose charters include matters that have legal/compliance implications. These might particularly include committees with responsibility for business and strategic planning, risk and enterprise management, and physician transactions and compensation. Are committees—and related management support—“talking to each other”? There is a great value attributed to “right hand/left hand” matters when it comes to legal compliance oversight.

Third, pursue additional internal education initiatives to enhance the ability of committee members to evaluate both the quality of the existing program, and to exercise oversight of matters coming before the committee.

Fourth, review the efficiency of existing reporting relationships of key officers such as the general counsel and the chief compliance officer to the compliance committee, and from the compliance committee to the full board.

Fifth, oversee efforts to compare the company's existing compliance program against the DOJ's new metrics and specific questions, and to make changes where appropriate.

Conclusion

A series of notable developments serves to substantially increase the challenges facing the board's compliance committee—and its prominence within the organization's governance structure. These new developments are likely to increase the expectations of the compliance committee in the next 12–18 months, if not longer. Meeting these expectations will likely require more frequent meetings, greater personal commitment from compliance committee members, closer support from the general counsel and chief compliance officer, and increased reporting to (and coordination with) other committees and with the full board. ●

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