



# The Governance Institute's E-Briefings



Volume 8, No. 2, March 2011

## Welcome to The Governance Institute's E-Briefings!

This newsletter is designed to inform you about new research and expert opinions in the area of hospital and health system governance, as well as to update you on services and events at The Governance Institute. Please note that you are receiving this newsletter because you are a Governance Institute member or expressed interest at one of our conferences.

### News, Articles, and Updates

## The 2011 Agenda for the Compliance Committee

*Michael W. Peregrine, Esq., Partner, McDermott Will & Emery, LLP*

*This article is the fourth in a series on efficient board committee practices (refer to previous issues of E-Briefings to read about the strategic alignment committee, executive compensation committee, and audit committee).*

The compliance committee of the non-profit hospital has a full and active agenda for 2011. Expectations of board/committee satisfaction with fiduciary standards relating to compliance oversight are increasing in a health reform environment. At the same time, regulatory tolerance for oversight and compliance lapses is decreasing. The federal government has dramatically increased its anti-healthcare fraud enforcement activity, and there is a disquieting new focus on individual accountability in connection with such enforcement initiatives. All of these combine to provide a very full plate for the members of the board's compliance committee. The good news is, however, that there exist clear guidelines on how the committee can effectively perform its obligations to the organization.

### The Caremark Standard

The backdrop to any evaluation of the compliance committee agenda begins with a working familiarity of the basic fiduciary obligation for compliance plan oversight. The seminal Delaware decision, *In re Caremark*, makes it clear that the board is obligated to confirm that a) an adequate corporate compliance program exists, and b) the plan works well enough to assure that important compliance developments come to the attention of

the board/compliance committee in a timely manner. Just how detailed the compliance program should be is generally considered to be a matter of the board's business judgment. Courts don't hold board members to a standard of perfection with respect to the effectiveness of the compliance committee. The law does, however, expect board members to be knowledgeable about the compliance program, to provide reasonable compliance oversight, and to establish a proper compliance-based "tone at the top."

At least in cases involving for-profit companies, the courts have set forth an extraordinarily high burden of proof as necessary to establish that board/committee members breached their Caremark compliance plan oversight obligation. It is not clear that courts would be as generous in the non-profit context, where there is no separate "market function" to monitor the conduct of board and committee members. In addition, recent corporate integrity agreements entered into between the Department of Health and Human Services Office of Inspector General (OIG) and individual hospitals make it clear that OIG has some concerns about board conduct, as well. However, suggestions on board/compliance committee conduct that may satisfy the relevant fiduciary standard can be found in the three compliance resource guide papers jointly

published by the Department of Health and Human Services Office of Inspector General, and the American Health Lawyers Association, which are worth reviewing.<sup>1</sup>

## What's New

There are a whole lot of new and significant compliance developments affecting the way the compliance committee goes about its business that demand some attention on the committee's agenda this year. They start, but certainly don't end, with the many significant anti-fraud and Medicare/Medicaid program integrity initiatives arising from the healthcare reform law. Not the least of these are revisions to the principal federal anti-fraud laws. These revisions affect such important topics as the "intent" standard required to commit a violation of the anti-kickback law and prompt repayment of any Medicare/Medicaid overpayment. Of course, recent headlines about False Claims Act recoveries in healthcare, law enforcement sweeps, and multiple arrests of healthcare providers and executives, provide committee members all they need to know about the zeal with which the federal government is enforcing these laws.

In that regard, the committee may want to make sure the organization has a clear policy with respect to the identification and prompt return of Medicare/Medicaid overpayments. It should also be sensitive to the compliance implications of the dramatic increase in hospital-physician integration occurring in large part in response to healthcare reform, and seek assurances from management that the compliance aspects of physician integration transactions are adequately vetted. Assuring coordination between the business planners working on the integration activity and the compliance and legal folks is a good use of the committee's time.

The committee should also be aware of the new amendments to the federal sentencing guidelines relating to compliance plan organization. The new amendments clarify the steps an organization should take in response to an incident of wrongdoing. They also elaborate on the appropriate reporting relationships between compliance and ethics officers, and the board and compliance committee. This stuff is low-hanging fruit for the compliance committee; amending the

---

<sup>1</sup> See [The Health Care Director's Compliance Duties: A Continued Focus of Attention and Enforcement](#), American Health Lawyers Association, 2010.

compliance plan to adopt these changes should be a "no-brainer."

Committee members should also note the action of the New York Medicaid inspector general to require an annual compliance certification to be signed by senior management or board representatives, and to express a willingness to examine whether governing board members have set an appropriate "tone at the top" when investigating Medicaid providers for fraud. Along the same lines, the committee should be aware of the increasing application of the responsible corporate officer doctrine (RCOD), a Supreme Court-grounded strict liability theory interpreted by the government as permitting (in certain circumstances) prosecution of officers and directors for civil and criminal misdemeanor criminal offense without the need to establish intent or personal involvement.

Indeed, the first extension of RCOD liability to healthcare providers has just arisen with the publication of new OIG guidelines for exercising its permissive exclusion authority when the organization itself is excluded from Medicare or Medicaid, or convicted of related offenses. Essentially, the guidelines describe the two bases by which OIG may act to exclude owners, officers, and key employees (not the board members) from the Medicare or Medicaid program. One of these is based solely on an individual's position within the organization—regardless of whether he/she knew or should have known of the conduct that led to the organization. It's strict liability, and it creates potential exposure for wide swath of the organization's management team. It's a credible threat and the committee—as well as the full board—needs to be aware of it and consider responsive strategies.

The committee may also want to monitor the progress of emerging Congressional legislation intended to extend that permissive exclusion authority to cover executives who left the company before problematic conduct was detected or punished by the government, and to exclude parent corporations of certain types of entities (e.g., corporate shells) convicted of fraud. The compliance committee should be responsible for monitoring the organization's response to the supplemental hospital tax-exemption requirements implemented as part of last year's healthcare reform law. These new supplemental requirements are for the most part in effect right now and compliance with them is of crucial importance to maintenance of the hospital's tax-exempt status, with all of its various implications. In addition, the

compliance committee will want to assure that the compliance officer has an appropriate level of supervision with respect to compliance with HIPAA requirements, especially given recent federal enforcement initiatives in that area.

## Quality of Care

Many new financial and reimbursement relationships arising post-healthcare reform address quality of care and patient safety issues, including but not limited to pay-for-performance programs, outcomes management, and related arrangements. In addition, government enforcement authorities are increasingly focused on the quality of care provided to Medicare/Medicaid beneficiaries.

The compliance committee is challenged to adopt mechanisms that recognize the compliance/legal liability issues associated with organizational failure to meet the quality of care obligations applicable to Medicare/Medicaid providers. These include False Claims Act and program exclusion risks, among others.

## Structural Recommendations

In addition to these items, there are a series of compliance plan structural issues worthy of committee attention in 2011 (the adoption of which would not only serve to strengthen the effectiveness of the organization's compliance plan but also support the good faith diligence of committee and board members under the Caremark standard).

### **Basic Concerns**

It's so important for the committee to periodically "kick the tires" of compliance plan operations and ask some basic questions:

- Is the staffing for the compliance function satisfactory given the organization's size and complexity?
- Are we hiring qualified compliance professionals and compensating them fairly?
- Is the compliance plan adequately funded?
- Does the chief compliance officer have a meaningful level of organizational authority and autonomy?
- Has the organization recently conducted a compliance plan self-assessment?

These questions are particularly important in a post-recession economy to assure that any hospital budget cuts did not affect the compliance

(or legal) functions in a disproportionately negative manner.

### **Committee Structure**

Along the same lines, the committee should periodically look internally and ask itself whether its own organizational structure is adequate to serve the needs of the full board for oversight of the organization's legal and compliance profile:

- Is the committee composed entirely of independent members?
- Does the committee meet with an appropriate frequency?
- Are the chief compliance officer (CCO) and general counsel (GC) invited to attend (as staff) all meetings of the committee?
- Does the committee meet in an execution session or similar confidential format with the GC and CCO?
- Is there coordination between the roles of CCO, GC, and the internal auditor?
- Does the committee agenda allocate sufficient time per meeting to compliance (as opposed to other) matters?
- Does the committee report to the board with an appropriate frequency?

### **Effectiveness Standards**

The committee should assure itself that the compliance plan has been amended to incorporate the new amendments to the compliance plan effectiveness standards adopted by the sentencing guidelines:

- An express, personal, and regular reporting relationship of the compliance officer and the board or compliance committee
- Organizational steps to be taken in response to an incident of wrongdoing

In addition, the committee should seek advice as to whether new state law mandates any particular compliance obligations on the board or committee.

### **GC/CCO Coordination**

Where the positions of general counsel and chief compliance officer are separated and held by different people, the compliance committee should be proactive in assuring proper coordination between the positions through such actions as:

- Making sure that the job descriptions of the two positions are complementary, not contradictory
- Making certain that they pursue an integrated and coordinated approach to suspected compliance failures
- Establishing protocols to identify and resolve disagreements between the GC and the CCO

- Helping assure that the roles of the GC and the CCO serve to position the organization to satisfy the conditions for application of legal privileges
- Establishing communication protocols between the GC and CCO to minimize the potential for conflicts of interest to restrict information flow

Where the positions of general counsel and chief compliance officer are held by the same person, the committee should require the adoption of written procedures intended to resolve related potential or actual conflicts of interest with respect to the conduct of internal investigations, board/committee reporting, and similar matters. Broadly speaking, the compliance committee should be vitally involved in making sure the compliance officer/general counsel relationship serves effectively to provide the committee and the board with information on the legal and compliance profile of the organization.

#### **Other Matters**

- In organizations that seek to pursue vigorous enterprise risk management (ERM) activities, it becomes incumbent on the compliance committee to make sure that corporate

compliance is not marginalized by the overall organizational commitment to ERM.

- The committee should also seek assurance that systems are in place to facilitate internal “up-the-ladder” reporting by the general counsel of actual or potential legal violations, in satisfaction of the GC’s ethical obligations under state bar association rules of professional responsibility.

#### **Conclusion**

Healthcare reform and the administration’s commitment to robust healthcare fraud enforcement combine to emphasize the importance attributed to satisfaction of the board’s Caremark compliance plan oversight obligations. This, in turn, makes it incumbent on the board as a whole to re-examine the effectiveness of its compliance plan structure and administrative oversight, with particular focus on the structure, role, and responsibilities of the board’s compliance committee. It is crucial that the board and compliance committee be fairly perceived as re-examining the vitality of their compliance oversight efforts in response to the new and more intense external environment. This will make the compliance committee a hotbed of activity in the coming year.

*The Governance Institute thanks Michael W. Peregrine, Esq., for contributing this article. He can be reached at [mperegrine@mwe.com](mailto:mperegrine@mwe.com).*