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Increased Scrutiny of Governance Role In Compliance

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In a noteworthy development, the New York State Office of Medicaid Inspector's (OMIG's) new 2009-2010 Work Plan contains specific focus on the compliance oversight obligations of the governing board.^[1] Indeed, the Work Plan indicates that in extreme situations, individual board members could be sanctioned for failure to satisfy their duties with respect to compliance programs oversight. As such, the Work Plan may presage similar positions being taken by regulators in other states, while simultaneously creating favorable organizational opportunities to increase the strength and vitality of compliance programs and related board oversight.

The Work Plan places a strong emphasis on the structure, operation, and board oversight of the corporate compliance program. This is reflective of new New York State statutory/regulatory requirements mandating the implementation and maintenance of such plans by Medicaid providers. The specific compliance plan references are contained in the "Executive Action" section of the Work Plan, under the heading "Compliance Guidance." To that end, the Work Plan reflects a five-pronged focus on compliance plan oversight:

- Development of "best practices" for effective compliance programs
- Provision of ongoing compliance guidance for providers
- Review of provider compliance programs in the course of audits/investigations
- Emphasizing the importance and independence of the compliance officer
- Emphasizing the importance of the oversight role of the governing board

In this regard, the Work Plan underscores the important role of the corporate compliance officer within the organizational hierarchy of the Medicaid provider. The compliance officer is described as the "cornerstone of the organization's efforts in establishing, facilitating and coordinating effective compliance programs."^[2] Particularly noteworthy in this regard is the OMIG's expectation that:

compliance officers will be placed at senior management positions within organizations and fellow senior management, provided adequate resources (*i.e.*, sufficient time, staff and budget) and granted access to relevant documents and other information necessary to effectively design, implement and monitor the compliance program.[\[3\]](#)

Perhaps more notable is the attention provided to the compliance oversight role of the governing board. As a general matter, the Work Plan notes the board's responsibility to exercise "reasonable oversight" of the organization's compliance plan. In this regard, the Work Plan is consistent with the fiduciary perspectives reflected in the well-recognized *Caremark* decision, in which the board's compliance program oversight obligations were formally articulated.[\[4\]](#)

Of potentially greater significance, though, is the OMIG's approach to holding boards accountable for the quality of their oversight. Specifically, in the course of an audit or investigation, OMIG will evaluate the extent to which the board has complied with these duties (*i.e.*, has "exercised reasonable oversight over information and reporting systems").[\[5\]](#) In other words, during an investigation or audit the OMIG will inquire whether the provider's compliance weakness is attributable in any way to lax compliance oversight by the governing board. In "appropriate circumstances," where the board has 'significantly failed' to satisfy its compliance and oversight duties, OMIG will consider sanctions against individual board members.[\[6\]](#) These sanctions could include censure and/or exclusion (presumably from serving in a fiduciary capacity with any New York State Medicaid provider).[\[7\]](#)

In doing so, the OMIG Work Plan is perhaps the first formal regulatory attempt to hold governing boards accountable for material compliance plan failures. Yet, the Work Plan position is not as audacious or aggressive as it first may appear. It is true that courts have historically applied a very high standard for assigning liability to board members for compliance plan liability: either (a) "utterly failing to implement any reporting or information system or controls"; or (b) "having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."[\[8\]](#)

However, OMIG's focus appears to be consistent with such standard; *i.e.*, to apply sanctions only in the event of "significant failures to comply with [board members'] duties with respect to compliance and oversight." Further, the power to sanction nonprofit board members for breach of their fiduciary duties (including the compliance plan oversight duties) is traditionally considered within the common law jurisdiction of the state attorney general and other charity regulators, who not infrequently seek equitable remedies in situations of material breach determined to have caused harm to the charity. In addition, the Work Plan is consistent with many of the themes regarding the compliance oversight

role of the governing board expressed in the trio of compliance plan guidance monographs published jointly by Department of Health and Human Services Office of Inspector General and the American Health Lawyers Association in recent years.^[9] Finally, the position seems to be consistent with federal Sentencing Guidelines requirements that an “organization’s governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.” In the current “climate of accountability,” there is an increasing boardroom awareness (if not acquiescence) that regulators may be more willing/compelled than in the past to scrutinize board conduct in the context of “preventable loss” (e.g., a corporate compliance loss or penalty) to the organization.^[10] In other words, and for many reasons, the OMIG position to hold boards accountable in extraordinary situations of breach of duty is neither novel, inconsistent with applicable case law, nor unexpected.

Where the OMIG Work Plan truly breaks ground is as a possible “dam-breaker” event. Given the broad state-by-state emphasis on both reducing Medicaid fraud and preserving charitable assets, it is entirely conceivable that other states—both Medicaid and possibly charity regulators—could follow OMIG’s lead in this regard. This is particularly the case given that the compliance plan discussions contained in the Work Plan are not the regulatory whim of an aggressive regulator. Rather, they are the thoughtful byproduct of a comprehensive review and analysis of Medicaid integrity activity in the state by both lawmakers and regulators. It should be of particular relevance to health lawyers that the development of the Work Plan’s discussions on compliance plan oversight incorporates extensive discussions between the OMIG and an advisory panel that included representatives of professional and institutional organizations.

Accordingly, the release of the Work Plan should be viewed in a “glass half full” perspective. It provides general counsel and compliance officers with a timely opportunity to work more closely with board and executive leadership to take steps designed to assure an appropriate level of compliance program oversight. This might include particular focus on (i) compliance committee composition; (ii) regular compliance reports to the board; (iii) the organizational authority (and budget) of the compliance officer; (iv) cooperation between the compliance officer and the general counsel; and (v) enhanced compliance program education to the full board and executive leadership team.

^[1] See www.omig.state.ny.us/data [hereinafter, “Work Plan”].

^[2] Work Plan, *supra* note 1, at p. 5.

[3] *Id.*

[4] *In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).

[5] Work Plan, *supra* note 1, at p. 6,

[6] *Id.*

[7] *Id.*

[8] See, e.g., the 2006 decision of the Delaware Supreme Court in *Stone v. Ritter*, 2006 Del. LEXIS 597 (Nov. 6, 2006).

[9] See www.oig.hhs.gov/fraud/complianceresources.asp.

[10] See Michael Peregrine, *Ten Ways to Reduce the Board's Liability Exposure*, BNA Health Law Reporter, vol. 17, no. 39, Oct. 2, 2008.