

# MEDICARE COMPLIANCE

## New OIG Guidance on Board Oversight Could Be a Compliance Game Changer

Compliance programs may get more traction with the release of new guidance on compliance oversight for health care board members. The guidance, which was unveiled April 20 by HHS Inspector General Daniel Levinson at the Health Care Compliance Association's Compliance Institute in Orlando, sets forth a more activist role for boards in their organization's compliance with laws and regulations. That includes holding managers accountable for compliance, supporting the self-disclosure of "compliance failures" and having regular executive sessions with compliance officers to "encourage more open communication."

Boards should "develop a formal plan to stay abreast of the ever-changing regulatory landscape and operating environment," according to the guidance, which OIG developed with HCCA, the American Health Lawyers Association and the Association of Healthcare Internal Auditors. Board members need reports on compliance and risk mitigation "separately and independently" from audit, compliance, human resources, legal, quality, and information technology so they can ask management "more pertinent questions" and "make informed strategic decisions about compliance."

### OIG Pushes Board Involvement

The message from OIG and its industry partners is clear: "The board of directors is part of the compliance team," says former federal prosecutor Robert Trusiak, who is now a principal in Compliance Experts, LLC, in Buffalo, N.Y. "It sets a new bar by investing those with the fiduciary commitment to the hospital — the board — in compliance in an affirmative manner rather than through passive oversight." This could be a turning point, with the compliance tone at the top now definitively starting with the board of directors "to ensure the C-suite executives view compliance neither as an irritant nor as something to pay lip service to, but as an every day, every transaction, every event commitment," Trusiak says.

The guidance expects boards to be "active," says former OIG senior counsel Brian Bewley, who is with Polsinelli. "It places responsibility on board members to know

what's going on in the industry as a whole and with the particular risks in their organizations."

There's a secondary gain for enforcement, Trusiak says. The guidance gives the Department of Justice another data point to use during the most confounding part of the false claims settlement process: deciding appropriate damages — single, double, treble, with or without per-claim penalties. During settlement discussions around financial penalties, prosecutors may take into consideration whether boards play an affirmative role in compliance, which has now been defined in the guidance, he says. They can search board minutes to see the prevalence of words like "HIPAA" and "Stark" as a means to assess the board's commitment to compliance. "You need objective markers to inform your judgment," he says. Is the organization committed to "growth or compliant growth?"

### OIG: CCOs Should Not Report to Counsel

The guidance gives board members practical advice for compliance oversight, which should evolve in response to new risks, new reimbursement methods and industry consolidation. To benchmark their organizations, boards should rely on familiar resources, including Federal Sentencing Guidelines, OIG compliance-program guidance and corporate integrity agreements. It's fine to scale them to smaller organizations, which may use "available personnel, rather than employing separate staff, to carry out the compliance and ethics program," as long as they show the same commitment to compliance and ethical conduct as larger organizations, the guidance states. Boards may have to be more hands-on with compliance at smaller organizations.

It should be crystal clear to board members how various departments — including compliance, legal, audit, human resources and quality assurance — relate to each other. OIG makes a point of saying compliance officers should not be under anyone's thumb because it compromises their effectiveness. "OIG believes an organization's Compliance Officer should neither be counsel for the provider, nor be subordinate in function or position to counsel or the legal department, in any manner," the guidance states. "While independent, an organization's counsel and compliance officer should collaborate

to further the interests of the organization. OIG's position on separate compliance and legal functions reflects the independent roles and professional obligations of each function; the same is true for internal audit." Some compliance officers have struggled with interference from internal counsel (*RMC 2/23/15, p. 1*), which may undermine transparency.

Boards may also want to have one member who is a regulatory, compliance or legal professional, or at least consult one periodically, the guidance says. "The presence of a professional with health care compliance expertise on the Board sends a strong message about the organization's commitment to compliance, provides a valuable resource to other Board members, and helps the Board better fulfill its oversight obligations."

More frequent executive sessions with compliance officers and other managers also is worth considering, the guidance says. It will promote dialogue and defuse tension with senior leaders — who aren't invited — because they get suspicious when a rare executive session is scheduled. Trusiak says this bodes well for compliance because boards may take a longer view of the best interests of the hospital than senior executives do. For example, a merger, physician practice acquisition or joint venture could increase volume in the short run, but hospitals also have to consider Stark, kickback and anti-trust implications with the help of lawyers well-versed in these risks.

### **Boards Should Identify Risk Areas**

Identifying risk areas is another obligation of the board, which should ensure management "consistently reviews and audits risk areas, as well as develops, implements, and monitors corrective action plans," the guidance states. Boards also have to "set and enforce expectations" for getting compliance information from management. "It may be helpful and productive for the Board to establish clear expectations for members

of the management team and to hold them accountable for performing and informing the Board in accordance with those expectations," the guidance notes. Management may be required to report on internal and external investigations, significant audit findings, hotline calls, "all allegations of material fraud or senior management misconduct, and all management exceptions to the organization's code of conduct and/or expense reimbursement policy."

There are a lot of incentives for board members to foster compliance programs that identify compliance failures and voluntarily report them to the government, the guidance notes. For example, organizations are compelled by the 60-day rule, which requires providers to return Medicare and Medicaid overpayments within 60 days of identifying them. "A Board would be well served by asking management about its efforts to develop policies for identifying and returning overpayments."

The emphasis on board and management responsibility for compliance is remarkable, Trusiak says. "They're redefining 'governance.' They want board members to become involved in management to the extent it implicates compliance matters," he says. The guidance, for example, encourages boards to ask how performance evaluations advance the organization's commitment to compliance and whether bonuses or "claw-backs" should be used to influence compliant behavior. "These are generally management areas," says Trusiak, former compliance officer for Kaleida Health. "They're not concerned with labels."

Now that the guidance is out there, Bewley says board members should benchmark their performance and make changes if necessary. The guidance is compelling because it is the consensus of both the government and the industry groups, he notes.

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