

Healthcare Board of Directors: Meeting Governance and Compliance Challenges

Minimizing Breach of Fiduciary Duty Risks Amid Heightened Government Scrutiny

THURSDAY, MAY 11, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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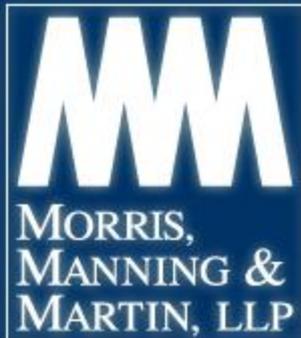
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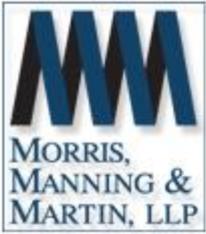
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Board Governance Responsibilities and Oversight of Compliance Programs



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May 11, 2017



Introduction to Board Duties

During this webinar we will consider:

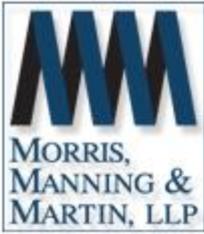
Sources of Board Member duties: Common law and statutory duties,

Elements of duty of care and oversight, duty of loyalty, and duty of obedience in the context of Boards of health care entities.

Consideration of duties in for profit and not for profit contexts

Sources and guidance for Boards of Directors of health care entities from the OIG and DOJ

Best practices for Boards to Consider and practical operational measures a Board can take to meet its governance responsibility.

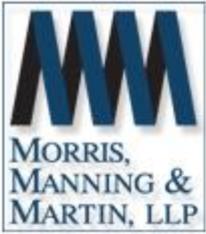


Duties of the Board to Company

The Board's fiduciary duties to Company inform its duty of compliance oversight. These fiduciary duties include the duty of care, the duty of loyalty, and the duty of obedience. In particular, the Duty of Care implicates a duty to oversee compliance programs.

- Duty of Care

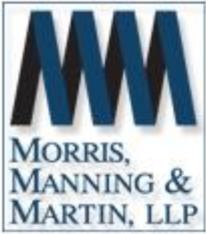
- The duty to act in good faith with the level of care that an ordinarily prudent person would exercise in like circumstances and in a manner that a director reasonably believes is in the best interest of the organization.
- Directors must conduct enough due diligence to allow them to make an informed decision – in other words, be aware of what is going on in the business.
- Directors are not required to know everything. They may reasonably rely on the advice of management, counsel, and other advisors.



Duties of the Board to Company

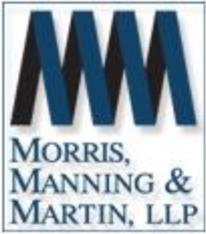
Cases discussing the Board's duty of oversight of the Compliance Program in terms of the Board's duty of care state that:

- A director has a duty to attempt in good faith to assure that:
 - A corporate information and reporting system exists;
 - The reporting system is adequate to assure the board that appropriate information as to compliance will come to the Board's attention in a timely manner and as a matter of ordinary operations.
 - *In Re: Caremark International, Inc. Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996)/shareholder derivative suit alleging insufficient Board oversight enabled corporate misconduct*



Duties of the Board to Company

- Pursuant to the *Caremark* standard, a corporate board should establish procedures to identify potential compliance issues and procedures to address potential or actual problems that arise. This standard thus ensures that any potential issue is halted or remediated, and will act to prevent recurrence.
- Thus, Directors must assist in overseeing establishment of a compliance program and must exercise general supervision and control over management carrying out such program.
- DIRECTORS MUST ASK QUESTIONS!

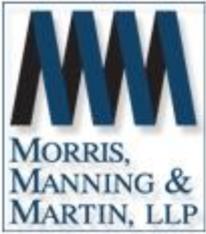


Duties of the Board to Company

Directors also must act in good faith as part of the duty of oversight to ensure that potential or actual violations of corporate policy or the law are stopped and measures taken to ensure that the problem will not repeat itself.

In general the oversight function of the Board operates to apply duty of care principles to the Board's function in monitoring the day to day and broad business operations of a health care entity.

Specifically, this requires the Board to act in good faith and to exercise reasonable care so that management pursues its executive functions in compliance with the law and with the mission of the health care entity.



Duties of Board to Company/Duty of Care Elements

In assessing a Board member's exercise of a duty of care, a director should do exactly what a court would do – undertake a fact intensive analysis that focuses on the following elements:

Is the intent of the director honest in seeking the best interest of the health care entity?

Does the director believe that the proposed action is in the best interest of the health care entity in light of applicable law and regulatory requirements?

Does the director have any conflicting interests in determining the best interests of the health care entity?

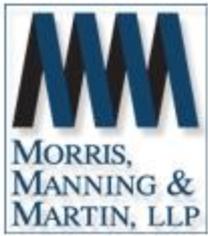


Duties of Board to Company/Duty of Care Factors

In assessing whether a director has met her duty of care, the ordinary prudent person standard will apply. This means that the director must inform herself of relevant factual and legal issues that a prudent businessperson would understand. Prudence does not require the director to be an expert, but rather to seek information and be informed.

Particularly in the not for profit context, the duty of care will look at directors who are in like or similar positions. This will take into account the size of the health care entity and the sophistication of its operations. But this does not excuse the exercise of sound judgment.

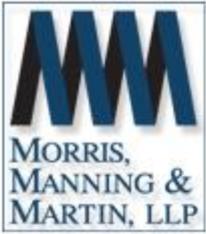
Particularly in the not for profit context, a director's exercise of duty of care will look at the similar circumstances under which a director acts.



Duty of Care And Business Judgment Rule

The business judgment rule is relevant in both the for profit and not for profit context. A governing board member who makes a business judgment in good faith satisfies the duty of care if she:

- (a) Is not interested, directly or indirectly, in the subject of the business judgment and can exercise independent judgment.
- (b) Is informed with respect to the subject of the business decision or judgment in question to the extent that she reasonably believes she is sufficiently formed to be appropriate under the circumstances.
- (c) Reasonably believes that the business judgment is in the best interest of the health care entity.



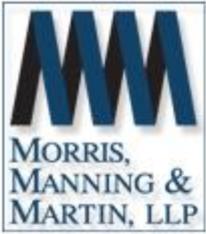
Duty of Loyalty

The duty of loyalty is an independent duty that forbids self dealing contracts or transactions and prohibits undisclosed conflict of interest transactions.

The duty of loyalty is implicated if a director has usurped a corporate opportunity, if there is a conflict of interest, or if the director is aware of facts relevant to a decision that other directors would not know.

The duty of loyalty also requires that a director consider whether a proposed course of conduct is consistent with the mission of the health care entity, and to raise questions respecting same.

The duty of loyalty also requires a director to consider whether other persons are receiving excessive compensation, or are conflicted.

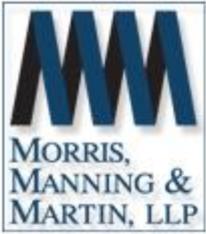


Duty of Obedience

In the not for profit context, a director also must be cognizant of the duty of obedience.

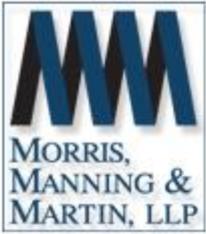
The duty of obedience reflects the doctrine that a not for profit corporation should not act outside of its mission and purpose.

The duty of obedience in the not for profit context also requires attention to whether the conduct of the organization is consistent with the donative intent of donors to the health care entity.



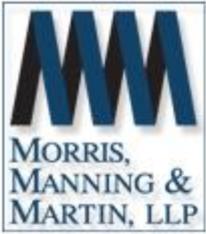
Lemington Home and Duty of Care

- The Lemington Home case is a stark reminder of the requirements of a Board's duty of care in the not-for-profit context and potential ramifications for failing to follow same. The Lemington Home for the Aged was "the oldest common, non-profit unaffiliated nursing home in the United States dedicated to the care of African-American seniors." Its Mission Statement was to "establish, support, maintain and operate an institution that is able to extend nursing home care for persons who are in firm due to age and other reasons without regard to age, sex, race, religion, and to do so regardless of whether such persons themselves had the ability to pay for such care." 777 F.3d 620, 625 (3rd Cir. 2015).
- Following a jury trial that held directors liable in 2013, the jury found that the directors had breached their duty of care but had complied with the duty of loyalty. The jury entered a joint and several verdict against the defendants in the amount of \$2.25 Million and awarded punitive damages in the amount of \$350,000, individually, against five of the director/defendants.



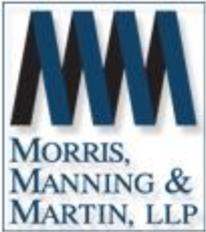
Lemington Home and Duty of Care

- On appeal, the Third Circuit found that the plaintiff had provided sufficient evidence that the director and officer/defendants had breached a duty of care as well as a duty of loyalty. The Court held the defendants had breached their fiduciary duties by failing to exercise reasonable oversight and diligence in connection with the operations of Lemington.
- The case was brought by the Committee of Unsecured Creditors of the Lemington Home for the Aged which went into bankruptcy proceedings. The linchpin of the evidence was with respect to mismanagement of the facility by the Chief Executive Officer and the Chief Financial Officer which then resulted in direct liability as to certain director/defendants.



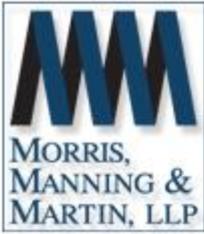
Lemington Home and Duty of Care

- As to the director/defendants, the Third Circuit held that the director/defendants breached their duty of care by failing to take action to remove the Administrator and the Chief Financial Officer once the results of their mismanagement came evident.
- In connection with such mismanagement, the evidence showed that the nursing home was out of compliance with state and federal regulations with respect to staffing, nursing oversight, and other quality of care issues for an extended period of time. The Third Circuit held that the directors did not act in good faith reliance on opinions, reports or statements prepared by employees or experts, but instead made a business decision to continue to employ an Administrator whose performance was deficient. As the Third Circuit reasoned, the director/defendants had “actual knowledge of her mismanagement, yet stuck their heads in the sand in the fact of repeated signs that residents were receiving care that was severely deficient.” 777 F3d at 630.



Lemington Home and Duty of Care

- In addition, the Third Circuit held that the Committee of Unsecured Creditors had concealed the Board's decision a decade prior to close the home and deplete the patient census to the detriment of creditors. This “deepening insolvency theory” was an independent breach of duty of care on the part of the director/defendants.
- While directors duties to creditors in the event of insolvency are relatively well-established, the decision in Lemington underscores the requirement of oversight well beyond the financial condition of a health care entity.
- Lemington has broad applicability in the not for profit context, and requires specific attention in the for profit context.



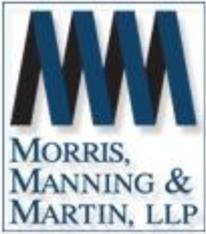
2015 OIG Guidance to Boards

In 2015 the OIG of the U.S Department of Health and Human Services offered “Practical Guidance for Health Care Governing Boards on Compliance Oversight.”

The OIG set out specific expectations for Board Oversight. To act in good faith pursuant to the duty of care the OIG indicates that the Board members must make inquiries to ensure that (1) a corporate information and reporting system exists and (2) the reporting system is adequate to assure the Board that appropriate attention relating to compliance with applicable laws will come to its attention timely as a matter of course.

The OIG indicates that a compliance program design should not take a one size fits all approach. However, one “are of inquiry members of health care organizations should be the scope and adequacy of the compliance program in light of the size and complexity” of the organization. That is because the “complexity of the organization will likely dictat the nature and magnitude of the regulatory impact and thereby the nature and skill set of resources needed to manage and monitor compliance.”

Interestingly, the OIG indicates that while one size does not fit all, for a smaller organization the Board may need to become more involved rather than less to ensure compliance.



2015 OIG Guidance to Boards

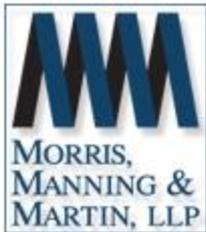
The OIG emphasizes that the Board should set and enforce expectations for receiving compliance related information.

The OIG states that the Board should receive regular reports that are separate and independent respecting the health care entity's risk management and compliance efforts.

The OIG encourages the use of formal, "objective scorecards that measure how well management is evaluating the compliance program, mitigating risks, and implementing corrective action plans."

The OIG encourages the Board and its Committees to consider conducting regular executive sessions that exclude senior management with leadership from compliance, legal, internal audit.

Fundamentally, the OIG is saying that the Board should ensure that management and the Board have strong processes for both (a) identifying areas of compliance risk; (b) ensuring adequate and clear lines of reporting to the Board of same; and (c) establishing clear mechanisms to address and remediate same.

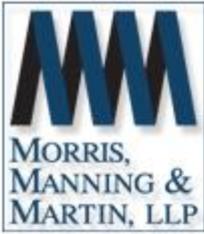


2015 OIG Guidance to Boards

The OIG notes that a Board can raise its level of expertise with respect to regulatory and compliance matters by adding a legal professional or compliance professional to the Board, or alternatively regularly consulting with same.

The OIG urges Boards and management to engage experts relevant to the operations of the health care entity, the applicable regulatory environment in which it operates, and even the governance of the entity, to assist in the exercise of directors' duties.

The OIG emphasizes the necessity of a formal plan to understand changes in the regulatory and operating environment of the health care entity, that the Board itself will oversee.



Recent Guidance on Measuring Compliance Plan Effectiveness and Relevance to Boards

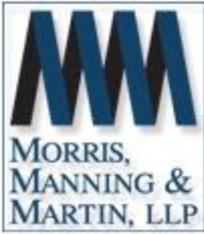
In February 2017 the Department of Justice issued guidance to enable organizations to evaluate corporate compliance programs. DOJ indicated that it considers these factors in investigating corporate conduct, and negotiating potential resolutions. A number of those guidelines specifically are addressed to Board conduct. Those include the following:

How has senior leadership encouraged or discouraged the conduct at issue? In that regard, how does the Board monitor the behavior of its senior leadership?

What has the Board done to ensure sufficient compliance expertise is available to the Board? Has the Board and its auditors held executive or private sessions with the compliance and control functions. What information did the Board examine by way of oversight in the specific operational area in which the alleged compliance problems arose?

Does the Board of Directors, or committees on the Board, encourage and enable direct reporting lines from compliance and relevant control functions?

What is the frequency that compliance and control functions would meet with the Board or a subset of the Board? Is senior management present at those meetings?



Recent Guidance on Measuring Compliance Plan Effectiveness and Relevance to Boards

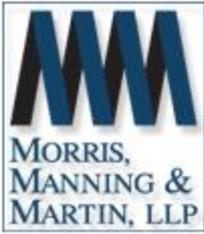
What resources has the Board ensured are available to support the compliance and audit functions.

Has the Board ensured that an investigation has been properly conducted by qualified personnel who are independent and objective?

What has been the Board's involvement with company response to compliance misconduct?

What has been the Board's involvement to ensure that individuals are not incentivized to engage in non compliant or unethical behavior.

What types of audits are available to the Board? What is the Board's response to audit to ensure continuous improvement?



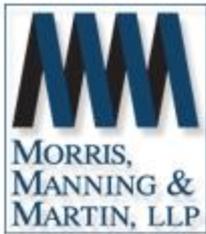
Recent Guidance on Measuring Compliance Plan Effectiveness and Relevance to Boards

In March 2017, the OIG and HCCA held issued recommendations to enable a health care entity to assess the robustness of its compliance program. This 53 page document has a number of recommendations that a Board should consider in determining whether it is adequately meeting its duty of care through appropriate oversight. They include the following:

The Board should annually review and approve the compliance plan.

The Compliance Committee of the Board or other appropriate oversight committee should review the compliance operations manual to ensure that it is up to date.

The Board should periodically review and approve the Code of Conduct



March 2017 Guidance on Measuring Compliance Plan Effectiveness and Relevance to Boards

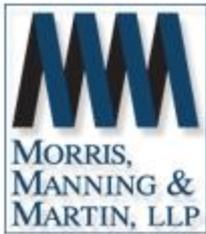
To ensure that the Board is active in its oversight, there should be a review of Minutes where the Compliance Officer reports in person on a quarterly basis to the audit and compliance committees of the Board

There should be a review of Minutes to ensure that the Board understands its oversight responsibilities and to ensure there is adequate Board education.

There should be a review to ensure that significant compliance problems are appropriately escalated to the Board in its oversight function.

The Board's charter should include approval of the compliance budget and the Board should approve the budget based on identified risks and evaluation of the effectiveness of the program.

The Board should also monitor the Company's auditing plan, review its results, and be actively involved in oversight of the auditing function



March 2017 Guidance on Measuring Compliance Plan Effectiveness and Relevance to Board/Compliance Committee Considerations

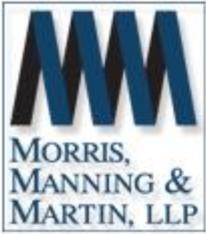
The March 2017 Guidance also sets forth a series of best practices to assess the robustness of the Compliance Committee. These include:

Review of charter of the Committee, and review of Committee structure to evaluation participation and effectiveness

Ensure that there are no conflicting charters

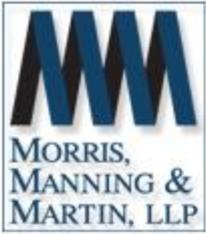
A review of frequency of meetings to ensure engagement of the Compliance Committee.

A review of leadership participation in the compliance committee and Board oversight of same.



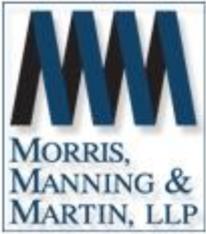
Yates Memo

- What it is:
 - The Department of Justice (“DOJ”) released a memo to all Assistant United States Attorneys (“AUSAs”) on September 2015 instructing investigators to focus on individuals as well as corporations in their investigations.
 - The memo also reminds civil and criminal investigators to remain in routine communication particularly when information would give use to a criminal investigation of an individual.
 - The memo discourages corporate resolutions that provide immunity to potentially culpable individuals.
 - This memo requires corporations to provide DOJ with all relevant facts relating to individuals to obtain cooperation credit.



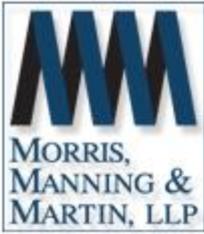
Yates Memo

- What it Means for Directors:
 - The policies in the memo are not new – they are part of a longstanding DOJ policy. However, the memo renews focus on individual liability in corporate investigations.
 - To the extent that Board members have knowledge of non-compliant activity and do nothing to try to stop it, or particularly seek to encourage non-compliant activity such as false billing or giving and receiving kickbacks, then the memo renews criminal focus on these individuals.



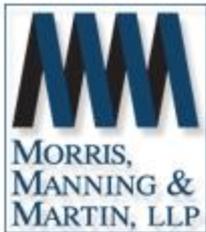
Yates Memo

- Board Responsibilities in Light of Memo:
 - Ensure implementation and ongoing compliance with compliance program.
 - If an issue is brought to the Board's attention, the Board has a duty to manage the issue and do whatever is in the power of the Board to maintain compliance.
 - The Board must actively remain educated on compliance issues and do what it can to actively support the compliance program including dedication of corporate resources to compliance.



Compliance Program Requirements

- Section 6102 of the Affordable Care Act required Skilled Nursing Facilities (“SNFs”) to have an effective Compliance and Ethics Program.
- CMS released proposed regulations governing such programs in July 2015:
 - Effective Compliance Programs became a Medicare condition of participation.
 - Surveyors will review the Compliance Program and failure to have and enforce same will result in deficiency citations.
 - CMS guidance also included new and amended conditions of participation and quality improvement program guidance.
 - Any successful Compliance Program should account for and oversee compliance with all relevant regulations.

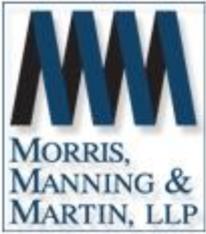


Compliance and Medicare Conditions of Participation

A compliance program protects the integrity of the health care entity's participation in the Medicare program. Compliance with laws is fundamental to a hospital's condition of participation in Medicare:

42 C.F.R. § 482.11 Condition of participation: Compliance with Federal, State and local laws.

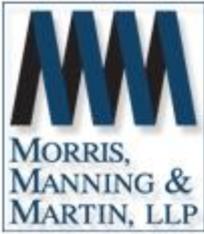
- (a) The [hospital](#) must be in compliance with applicable Federal laws related to the health and safety of patients.
- (b) The [hospital](#) must be -
 - (1) Licensed; or
 - (2) Approved as meeting standards for licensing established by the agency of the State or locality responsible for licensing [hospitals](#).
- (c) The [hospital](#) must assure that personnel are licensed or meet other applicable standards that are required by State or local laws.



What is an Effective Compliance Program?

Effective Compliance Programs do three things:

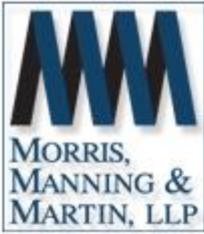
- 1.They function on a prospective basis to prevent compliance problems.
- 2.They identify and resolve compliance problems that do arise quickly and effectively.
- 3.They enable qualified and responsible individuals to investigate, fix, and report, as necessary, compliance breaches that occur.



What is an Effective Compliance Program?

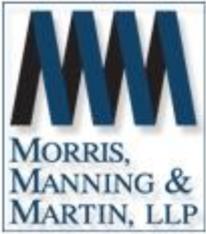
At a minimum, and as required by Section 6102 of PPACA, an effective Compliance Program should include the following elements:

- The development and distribution of a written code of conduct and written policies and procedures that promote commitment to compliance and that state the principles that will guide the provider.
- The designation of a Chief Compliance Officer and Compliance Committee, and other bodies charged with assisting the Compliance Officer.
- The development and implementation of regular education and training programs at all levels of the organization including Board education.
- The development of processes to integrate compliance into all levels of employees' jobs.
- Establishment of a hotline or other process to receive complaints and reports from employees or other persons who may wish to remain anonymous, and other effective communications processes.



What is an Effective Compliance Program?

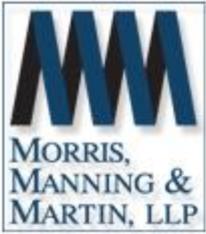
- The development of a system to respond to reports or improper activities.
- The development of a system of appropriate disciplinary actions.
- Sanction monitoring.
- The development of an audit system that acts both proactively through ongoing compliance audits and reactively to audit potential compliance issues.
- The development of a system to address and remediate problems that are identified.
- Periodic/annual reassessment of Compliance Program.



What is an Effective Compliance Program? Identifying Risk.

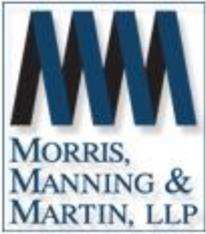
Through its policies and procedures and audit functions, a Compliance Program should identify and create methods to address the a health care entities chief risk areas. A Compliance Program should also ensure compliance with CMS' conditions of participation and compliance. Areas of risk identified by CMS and OIG with respect to a provider of long term care services, for example, include:

- Quality of Care:
 - Ensure that there is a function to analyze each resident's functional capacity and develop a comprehensive plan of care, including measurable objectives and time tables to meet resident needs. Care plans should be instituted within 48 hours of admission.
 - Ensure a method to review and analyze each resident's ongoing outcomes and to make needed adjustments.
 - Ensure that policies exist to ensure appropriate and sufficient treatment addressing each resident's clinical conditions.
 - Ensure policies to accommodate resident's needs and preferences.
 - Ensure policies to manage and monitor proper prescription and drug usage.
 - Ensure policies to manage and monitor staffing levels, training, and staff supervision as well as to have an appropriate interdisciplinary care team.
 - Ensure policies to appropriately assist resident with needs of daily living, including ongoing activity programs.
 - Ensure policies to report neglect, mistreatment, abuse, etc.
 - Develop policies to track and improve hospital readmissions.



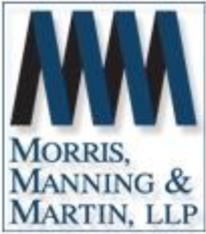
What is an Effective Compliance Program? Identifying Risk.

- Areas of Risk Continued...
 - Patient Rights – Ensure Policies that Address the Following Risk Areas:
 - Discriminatory admission or denial of access to care.
 - Abuse; whether verbal or mental or involuntary seclusion.
 - Inappropriate use of restraints or sedatives.
 - Failure to ensure personal privacy, access to personal records, and assurance of privacy of such records.
 - Denial of resident's right to participate in care decisions.
 - Failure to safeguard financial affairs.



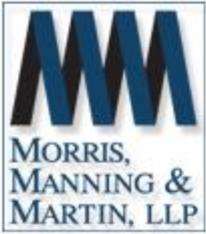
What is an Effective Compliance Program? Identifying Risk.

- Areas of Risk Continued . . .
 - Billing and Cost Reporting:
 - Submitting claims for medically unnecessary equipment, supplies and services including therapy services.
 - Submitting claims to Medicare Part A for ineligible residents.
 - Duplicate billing.
 - Knowing billing for substandard care.
 - Providing inaccurate information on resident condition in MDS or other information used to assign RUGs or other inaccurate reporting causing higher assignment of RUGs.
 - Billing for items and services not rendered.
 - Upcoding.
 - Unbundling or billing for items or services included in per diem rate.
 - Failure to maintain sufficient documentation.
 - Failure to satisfy conditions of participation.
 - Submitting false cost report.



What is an Effective Compliance Program? Identifying Risk.

- Areas of Risk Continued . . .
 - Employment Screening:
 - Ensure that policies address full screening of employees including temporary employees.
 - Kickback and Self Referrals – Risk Areas include:
 - Improper incentives to physicians.
 - Arrangements with physicians and hospitals.
 - Referral arrangements.
 - Arrangements with vendors.



What is an Effective Compliance Program?

If problems are identified, policies and procedures should exist to report and remediate such problems and to take appropriate action to repay or self-report to the government or fiscal intermediary as may be required. Such policies may include the following elements:

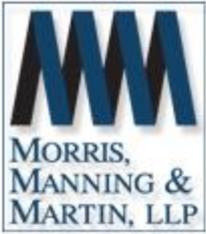
- Report up the chain of command depending on the severity of the issue and decisions to be made with respect to correcting the issue.
 - Reporting to the Board in all instances may not be necessary, but the Board should receive regular reports on happenings in the organization regarding compliance.
- Educate the appropriate parties to remediate the issue going forward.
- Determine whether overpayments have been made and if so develop a plan to repay such overpayments or self-report to the government as necessary depending on the particular situation.
 - Policies should specify who should be involved in decision-making process depending on severity of issue.



What is an Effective Compliance Program?

The OIG has recommended that Boards review forms of Corporate Integrity Agreements to understand what an effective Compliance Program is.

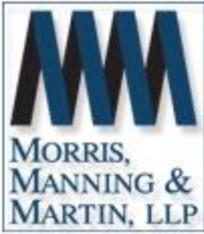
- Corporations who have reached settlements with the government often enter into CIAs, which require strenuous and ongoing compliance activities.
- While all requirements of a CIA are not applicable to all organizations, CIAs can give Board members a good idea of what a very robust Compliance Program would look like.



Fundamentals of Board Oversight of Compliance Program

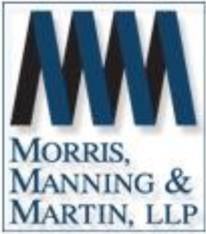
As part of its oversight role, the Board should ensure that these fundamental elements are being met:

- The Board should conduct periodic reviews of the Compliance Program to ensure that it is adequate and that it is being robustly enacted;
- The Board should Consult counsel as necessary regarding adequacy of Compliance Program;
- The Board should seek out and receive periodic and regular education regarding compliance issues – particularly given the quickly-evolving health care regulatory landscape and the stringent requirements for SNFs;
- Each Board members should ask questions to ensure that the Compliance Program is adequate and capturing potential issues;
- The Board should receive periodic reports on ongoing compliance activities or concerns.



The Role of the Compliance Officer

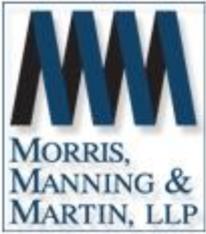
- Organizations should have a Compliance Officer who should function separate from the Organization's general counsel.
- Organizations should also appoint a Compliance Committee to advise and assist the Compliance Officer in implementation and oversight of the compliance.
- The Compliance Officer is typically in charge of day-to-day implementation and function of the Compliance Program.
- The Compliance Officer should have the ability to report directly to the Board rather than through executives or counsel.
- The Board is entitled to rely on advice of the Compliance Officer in carrying out its duty to remain informed on the organization's compliance efforts.



The Role of Counsel

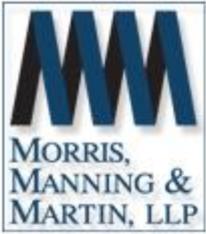
The Role of Counsel:

- Whether an organization has internal general counsel or utilizes outside counsel, each organization should have counsel that it can rely on for legal questions regarding compliance issues.
- The OIG takes the position that the chief legal counsel and Compliance Officer should be separate functions.
- Counsel can be utilized in a number of ways to further Compliance Programs including assisting and maintaining the regulatory aspects of the program, allowing compliance investigations to be conducted under privilege when conducted through outside counsel, assisting in educational efforts, particularly on regulatory issues, and taking the lead in developing an appropriate response and plan following a compliance issue.
- Boards are entitled to rely on advice of counsel in carrying out their duty of inquiry and oversight.
- The OIG has recommended that Boards either have counsel on the Board or at the very least routinely consult with counsel to stay abreast of emerging issues.



Board Education

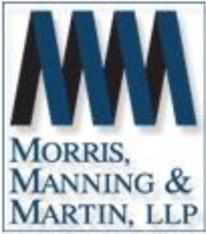
- Among the most important actions a Board should take in overseeing the Compliance Program is remaining educated on issues that might affect compliance efforts.
- If the Board doesn't understand the relevant laws, regulations, hot-button issues, current OIG investigations, changes in reimbursement, industry trends, etc., the Board cannot effectively oversee the Compliance Program and breaches its duty of care.
- The Board should schedule routine educational sessions, and Board members should individually make an effort to keep current on healthcare news and emerging issues – especially within the skilled nursing/long-term care space.



Routine Reports

The Board should receive routine reports on compliance efforts and any news regarding compliance. At a minimum such reports should include:

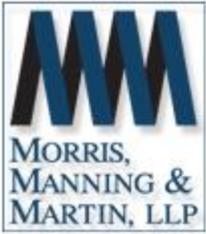
- Ongoing compliance functions
- Ongoing risk mitigation efforts
- Internal or external audits being conducted
- Potential areas for concern that have been identified
- Serious issues that have been uncovered
- Resident satisfaction and quality of care metrics
- Reports on compliance efforts in each area of the organization including legal, compliance, audit, HR, management, and quality of care initiatives.



Direct Executive Staff

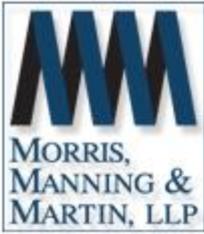
While the Board itself does not take day-to-day actions within an organization in most cases, it is the Board's duty to direct Company's executive and management staff to take action as necessary.

- If the Board determines that steps are not being taken to address, for example, a new regulation, the Board should direct management to undertake actions to do so.
- If the Board receives information about compliance concerns that are not being addressed, the Board must direct management to address such concerns.
- If the Board believes that the Compliance Program isn't functioning well or needs to be updated, the Board must direct management to take steps to update the Compliance Program.



Questions: To Ask and Be Able to Answer

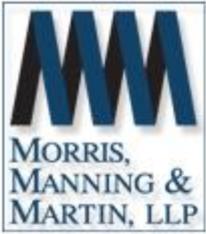
1. How is Company's Compliance Program structured and who are the key employees responsible for its implementation and operation?
2. What is the role of Company's Compliance Officer and counsel in operating the Compliance Program?
3. How is the Board structured to oversee compliance?
4. How does Company's compliance reporting system work? How frequently does the Board receive reports about compliance issues?
5. What are the goals of Company's Compliance Program?
6. What are the limitations of the programs? How can these be addressed?



References

The Information contained in this presentation has been compiled from a series of guidance that has been jointly published since 2003 by the Office of Inspector General, the American Health Lawyers Association, the Healthcare Compliance Association, and the Association of Healthcare Internal Auditors.

- “Corporate Responsibility and Corporate Compliance: a Resource for Health Care Boards of Directors” (4-2-2003) <http://oig.hhs.gov/fraud/docs/complianceguidance/040203CorpRespRsceGuide.pdf>
- “In Integrated Approach to Corporate Compliance: A Resource for Health Care Boards of Directors” (7-1-2004) <http://oig.hhs.gov/fraud/docs/complianceguidance/Tab%20E%20Appendx-Final.pdf>
- “Continuing the Partnership: A Summary of the Government-Industry Roundtable on the Role of Governance in Compliance Programs” (12-02-2004) <http://oig.hhs.gov/fraud/docs/complianceguidance/ComplianceRoundtable112204.pdf>
- “The Health Care Director’s Compliance Duties: A Continued Focus of Attention and Enforcement” (08-29-2011) http://oig.hhs.gov/compliance/compliance-guidance/docs/Health_Care_Directors_Compliance_Duties.pdf
- “Handout: A Toolkit for Health Care Boards” (02-27-2012) <http://oig.hhs.gov/newsroom/video/2011/toolkit-handout.pdf>



References

Continued:

- “Practical Guidance for Health Care Governing Boards on Compliance Oversight” (04-20-2015)
<http://oig.hhs.gov/compliance/compliance-guidance/docs/Practical-Guidance-for-Health-Care-Boards-on-Compliance-Oversight.pdf>
- Federal Register, Vol. 65, No. 52 (Mar. 16, 2000) Notice - OIG Compliance Program Guidance for Nursing Facilities <https://oig.hhs.gov/authorities/docs/cpgnf.pdf>
- Federal Register, Vol. 73, No. 190 (Sep. 30, 2008) Notice - Notice of Meeting of the Advisory Committee on Organ Transplantation
https://oig.hhs.gov/fraud/docs/complianceguidance/nhg_fr.pdf
- Corporate Integrity Agreement Between the Office of Inspector General of the Department of Health and Human Services and CF Watsonville East, LLC, and CF Watsonville West, LLC
https://oig.hhs.gov/fraud/cia/agreements/CF_Watsonville_05202015.pdf



Best Practices: Governance & Compliance for Healthcare Boards

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May 11, 2017



Best Practices: Governance & Compliance

- Procedures to Discourage Fraud & Misbehavior
- Board Oversight – Compliance Program
- Management Utilization
- Ongoing Education and Training
- Monitoring and Auditing to Detect Criminal Conduct
- Periodic Risk Assessment

Procedures to Discourage Fraud & Misbehavior

- Establish and utilize procedures for Board oversight of the organization^{2,3,5}
- Quality^{4,5,6}
- Set Strategic Direction⁴
- Maintain awareness of, and responsibility for, content and implementation/operation of compliance program¹

Board Oversight: Compliance Program

- Assign high-level personnel (Management/Compliance Officer) to oversee implementation and operations of the compliance program^{1,3}
- Require – whether from Management or a Board Committee – regular reports on the status of the compliance program^{1,3,5}
- Set the goals for the compliance program and provide the rationale, objectives, and limitations of the organization in setting and reaching those goals³
- Implement mechanisms and requirements for timely reporting of suspected or known violations to the Board, as well as procedures for taking remedial action (e.g. implementation of corrective action plans)^{1,3}
- Create and maintain procedures for comprehensive periodic and ongoing risk assessments and internal audits to ensure the Board is apprised of risks and other issues facing the organization^{1,3}

Management Utilization

- In addition to the delegation of authority and utilization for education and reporting purposes, the Board should:
 - be directly involved with setting performance benchmarks for upper-Management⁴
 - provide direct support for training and education of upper-Management⁴
 - be committed to providing Management with the tools (e.g. budget and personnel) necessary to carry out those day-to-day operations.¹

Ongoing Education & Training

- Periodic education and training:¹
 - occur at all levels of the organization
 - new or revised regulatory standards related to the healthcare or corporate environment
 - related to the compliance program requirements

Monitoring & Auditing to Detect Criminal Conduct

- Periodic Risk Assessment & Internal Audits^{1,3,5}
 - “Compliance in health care requires monitoring of activities that are highly vulnerable to fraud or other violations. Areas of particular interest include referral relationships and arrangements, billing problems (e.g., upcoding, submitting claims for services not rendered and/or medically unnecessary services), privacy breaches, and quality-related events.”⁵
 - Conduct internal audits⁵
 - Develop and institute system for confidential and/or anonymous reporting of potential or actual criminal conduct^{1,3}

Periodic Risk Assessment

- Underpinning all aspects of the compliance program is the need for periodic risk assessment^{1,5}
- Periodic risk assessment should utilize consistent and effective processes for identifying risk areas^{1,5}
- The results of the risk assessment should be:
 - Used to update, amend, and modify the existing compliance program and risk assessment procedures; and
 - followed by a corrective action plan^{1,5}

Budgeting for Internal Controls & Compliance Monitoring

- Consider the costs:⁸
 - **Direct**
 - **Indirect**
 - **Opportunity**

D&O Insurance and Indemnification Arrangements

- Directors and Officers liability insurance (D&O insurance) is primarily used to protect directors and officers from personal losses suffered because of their service to the organization.⁷
- Also used as insurance coverage that reimburses the organization for:⁷
 - Amounts paid toward indemnification of officers and directors acting on behalf of the organization; and
 - Certain direct claims made against the organization.
- Another form provides reimbursement to specific directors/officers holding positions with other organizations.⁷

Resources

- 1 – United States Sentencing Commission, *Guidelines Manual* (Nov. 2016) available at <http://www.ussc.gov/guidelines/2016-guidelines-manual>.
- 2 – Office of the United States Attorneys, *United States Attorney's Manual*, Title 9: Criminal - Principles of Federal Prosecution Of Business Organizations (Nov. 2015) available at <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>
- 3 – Office of the Inspector General of the U.S. Dept. of Health and Human Services and the American Health Lawyers Association, *Corporate Responsibility and Corporate Compliance: A Resource for Health Care Boards of Directors*, (April 2003) available at <https://oig.hhs.gov/fraud/docs/complianceguidance/040203CorpRespRscGuide.pdf>
- 4 – “50 best practices for high-performing health system boards” Beckers Hospital Review, January 12, 2016 available at <http://www.beckershospitalreview.com/hospital-management-administration/50-best-practices-for-high-performing-health-system-boards.html>
- 5 – Office of the Inspector General of the U.S. Dept. of Health and Human Services, *Practical Guidance for Health Care Governing Boards on Compliance Oversight*, (April, 10, 2015) available at <https://oig.hhs.gov/compliance/compliance-guidance/docs/Practical-Guidance-for-Health-Care-Boards-on-Compliance-Oversight.pdf>.
- 6 - Office of the Inspector General of the U.S. Dept. of Health and Human Services and the American Health Lawyers Association, *Corporate Responsibility and Health Care Quality: A Resource for Health Care Boards of Directors*, (June 2007) available at <https://oig.hhs.gov/fraud/docs/complianceguidance/CorporateResponsibilityFinal%209-4-07.pdf>
- 7 – Practice Note – *Directors and Officers Liability Insurance Policies*, Practical Law, Feb. 10, 2011.
- 8 – *Budgeting for a Compliance Audit: A Practical Framework*, Threat Stack Blog and Cloud Security News (Sept. 21, 2016) available at <https://blog.threatstack.com/budgeting-for-a-compliance-audit-a-practical-framework>