HANYS Healthcare Association of New York State

SUMMARY

U.S. Department of Health and Human Services' Office of the Inspector General (OIG)
Practical Guidance for Health Care Boards on Compliance Oversight

April 21, 2015

OIG's April 20 guidance discusses five topic areas: board oversight responsibilities, the roles and duties of various management functions, communications with and reports to the board, identifying potential risk areas, and encouraging accountability and compliance. The following is a summary of the five topic areas.

Board Oversight Responsibilities

At the outset, OIG notes that "A critical element of effective oversight is the process of asking the right questions of management to determine the adequacy and effectiveness of the organization's compliance program . . . ." Notably, OIG does not indicate that board members themselves must have compliance expertise: their primary responsibility is to make inquiry of management and others and be provided appropriate information.

OIG states, "Although compliance program design is not a 'one size fits all' issue, boards are expected to put forth a *meaningful effort* to review the adequacy of existing compliance systems and functions." OIG recognizes that compliance program complexity and scope will vary according to the size of the organization and that smaller and less complex organizations may meet requirements "with less formality and fewer resources than would be expected of larger organizations."

OIG reiterates that management is responsible for keeping the board abreast of the ever-changing regulatory landscape and operating environment. Again, OIG does not express the expectation that board members themselves must be independently knowledgeable about regulatory and policy changes. OIG suggests that "boards may want management to create a formal education calendar that ensures that board members are periodically educated on the organization's highest risks."

Roles and Responsibilities

This section identifies five key management functions that, while distinct, collaborate to inform the overall compliance program operation:

- compliance;
- legal;
- internal audit;

- human resources; and
- quality improvement.

The OIG commentary emphasizes the need for a close working relationship among these functional areas and board understanding of how management works together across these functions to identify risks and investigate, remedy, and monitor compliance issues. Unfortunately, the OIG document offers few practical suggestions regarding these points.

Reporting to the Board

OIG states, "Boards of health care organizations should receive compliance and risk-related information in a format sufficient to satisfy the interests or concerns of their members and to fit their capacity to review that information." Often guidance from oversight and enforcement agencies tilts toward compliance "overload" at the board level; the OIG statement is a more reasonable and balanced perspective.

As to what should be communicated to a board, OIG indicates, "Regular internal reviews that provide a board with a snapshot of where the organization is, and where it may be going, in terms of compliance and quality improvement, should produce better compliance results and higher quality services." The statement is important in that it recognizes that management is responsible for apprising the board, in meaningful, summary fashion, of compliance program activities and longer-term trends.

OIG acknowledges, and New York law specifically states, that boards are entitled to rely on information and recommendations from experienced managers, legal counsel, and consultants and are shielded from liability for making good-faith decisions based on information provided.

Identifying Risk Areas

Unsurprisingly, OIG notes that compliance risk areas are identified from internal sources such as legitimate whistleblowers, self-audits and compliance lapses; and external sources such as federal and state government guidance, workplans, special alerts, professional association advisories, and audits of peer facilities.

The "snapshot" reports by management to the board, referenced above, should include risk identification. OIG states, "The board should ensure that management consistently reviews and audits risk areas, as well as develops, implements, and monitors corrective action plans."

The OIG also points out that the plethora of transparency initiatives on quality outcomes, payment data and payments to physicians by pharmaceutical companies, can also be meaningful sources for identifying risk.

Encouraging Accountability

OIG recommends that participation in compliance activities be incorporated into employee evaluations and used as a basis for withholding or providing meaningful incentives. "Some

companies have made participation in annual incentive programs contingent on satisfactorily meeting annual compliance goals. Others have instituted employee and executive compensation claw-back/recoupment provisions if compliance metrics are not met," the guidance states.

This section of the guidance concludes:

> "As an extension of their oversight of reporting mechanisms and structures, boards would also be well served by evaluating whether compliance systems and processes encourage effective communication across the organization and whether employees feel confident that raising compliance concerns, questions or complaints will result in meaningful inquiry without retaliation or retribution. Further, the board should request and receive sufficient information to evaluate the appropriateness of management's responses to identified violations of the organization's policies or federal or state laws."

HANYS recommends that all members become familiar with the new OIG guidance and, as appropriate, incorporate OIG suggestions into their corporate compliance programs.

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