OIG Compliance Expectations for the SNFs and Boards: Lessons Learned From Recent CI As

Paula G. Sanders, Esquire
Cynthia A. Haines, Esquire
Post & Schell, PC

Felicia Heimer, Senior Counsel
Office of Counsel to the Inspector General
U.S. Department of Health and Human Services

Overview

• Centers for Medicare and Medicaid Services (CMS) proposed regulations for compliance plans changes the enforcement landscape

• Consider Office of Inspector General (OIG) issuances as strategies for ensuring compliance

• Engage the board and find new ways to hold everyone accountable
The Changing Compliance Environment


- Centers for Medicare & Medicaid Services (CMS) issues proposed regulations for mandatory compliance programs (July 2015)

- Department of Justice (DOJ) issues “Individual Accountability for Corporate Wrongdoing” (Sept. 2015)

Compliance Before the Affordable Care Act (ACA)

- OIG Compliance Program Guidance (CPG) for Nursing Facilities (March 2000)
- OIG Supplemental CPG (Sept. 2008)
- Roadmap of OIG’s expectations of effective compliance program
  - Not “one-size fits all”
  - OIG states that long-term care providers other than SNFs, such as assisted living providers, should find the Supplemental CPG “useful”
ACA: Compliance Is Mandatory

- ACA Sections 6102 and 6401 required compliance and ethics programs by March 13, 2013

- Statutory provisions are self-implementing
  - Centers for Medicare and Medicaid Services (CMS) required to issue regulations 36 months after the passage of ACA
    - Proposed regulations issued July 16, 2015

CMS Proposed Compliance Regulations

- Three goals of compliance
  - How best to establish internal controls
  - Prevent fraudulent activities
  - Promote quality of care

Getting “On Board” With Compliance

• New CMS proposed regulations for compliance programs make compliance effectiveness part of the federal survey process
  ▪ Effective compliance will be a requirement of participation
  ▪ Failure will result in deficiency citations
    ‣ Scope and severity unclear at this time
    ‣ Your 5 star rating could be at risk!

Compliance Program Elements (CMS)

• Code of Conduct/Written Policies and Procedures
• Compliance Officer and Compliance Committee
• Sanction Screening
• Effective Education and Training
• Auditing and Monitoring
• Effective Lines of Communication
• Enforcement System and Disciplinary Measures
• Effective Measures to Respond to Detected Noncompliance
• Periodic/Annual Reassessment of Compliance Program
OIG Issuances

- Annual Work Plan
- Compliance Program Guidances (CPGs)
- Fraud Alerts, Special Advisory Bulletins
- Corporate Integrity Agreements (CIAs)
- “Compliance 101” Educational Materials and Podcasts


- Board must act in good faith in the exercise of its oversight responsibility, including making inquiries to ensure:
  - A corporate information & reporting system exists and
  - The reporting system is adequate to assure the Board that appropriate information relating to compliance with applicable laws will come to its attention timely and as a matter of course
OIG Guidance to Boards

• Ensure that management is aware of the Guidelines, compliance program guidance, and relevant CIAs

• Ensure that Board members are periodically educated on the organization’s highest risks

• Develop a formal plan to stay abreast of changing regulatory landscape and operating environment

OIG Guidance to Boards

• Add to Board, or periodically consult with, experienced regulatory, compliance, or legal professional

• Receive compliance & risk related information in a format sufficient to satisfy the interests or concerns of members and to fit their capacity to review that information
OIG Guidance to Boards

• Consider conducting regular “executive sessions” (i.e., excluding senior management) with leadership from the compliance, legal, internal audit, and quality functions to encourage more open communication

• Risk areas 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

OIG Guidance to Boards

• When failures or problems in similar organizations are publicized, Board members should ask their own management teams whether there are controls and processes in place to reduce the risk of, and to identify, similar misconduct or issues within organizations

• Monitor new areas of risk: increasing emphasis on quality, industry consolidation, and changes in insurance coverage and reimbursement
OI G Guidance to Boards

- Boards of entities that have financial relationships with referral sources or recipients should ask how their organizations are reviewing these arrangements for compliance with the physician self-referral (Stark) and anti-kickback laws

- Board would be well served by asking management about its efforts to develop policies for identifying and returning overpayments (60 day repayment rule)

Sample Board Certification

"The Board of Directors has made a reasonable inquiry into the operations of Center's Compliance Program including the performance of the Compliance Officer and the Compliance Committee. Based on its inquiry and review, the Board has concluded that, to the best of its knowledge, Center has implemented an effective Compliance Program to meet Federal health care program requirements and the obligations of the CIA."
Sample Management Certification

"I have been trained on and understand the compliance requirements and responsibilities as they relate to [department], an area under my supervision. My job responsibilities include ensuring compliance with regard to the [department] with all applicable Federal health care program requirements, obligations of the CIA, and Center’s policies, and I have taken steps to promote such compliance. To the best of my knowledge, except as otherwise described herein, the [department] is in compliance with all applicable Federal health care program requirements and the obligations of the CIA. I understand that this certification is being provided to and relied upon by the United States."

Department of Justice (DOJ) Initiatives


- Assistant Attorney General Caldwell outlines how criminal division compliance counsel will identify effective compliance programs, Nov. 2, 2015

- DOJ hires new “Compliance Counsel” for Fraud Division, Hui Chen, as of Nov. 3, 2015
“Individual Accountability for Corporate Wrongdoing”

- Deputy Attorney General Sally Yates issued memo to Dept. of Justice Sept. 9, 2015 (the “Yates Memo”)
- 6 steps to strengthen pursuit of individual corporate wrongdoing
  - Redress misconduct
  - Deter future wrongdoing

Yates Memo

1. To be eligible for any cooperation credit, corporations must provide DOJ with all relevant facts about the individuals involved in misconduct

2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.
**Yates Memo**

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.

5. Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.

---

**Yates Memo**

6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

   ▶ Takeaway???
DOJ Metrics of Effective Compliance

- Do directors and senior managers provide strong, explicit and visible support for its corporate compliance policies?

- Do the people who are responsible for compliance have stature within the company?
  - Do compliance teams have adequate funding and access to necessary resources?

DOJ Metrics

- Are compliance policies clear and in writing?
  - Are policies easily understood and translated into languages spoken by employees?

- Are policies effectively communicated to all employees?
  - Are written policies easy for employees to find?
  - Do employees have repeated training, including direction regarding what to do or with whom to consult when issues arise?
DOJ Metrics

• Are policies and practices reviewed and revised to keep them up to date with evolving risks and circumstances?

• Are there mechanisms to enforce compliance policies evenhandedly?
  ▪ Include both incentivizing good compliance and disciplining violations.

DOJ Metrics

• Does company sensitize third parties like vendors, agents or consultants to the company’s expectation that its partners are also serious about compliance?
  ▪ More than including boilerplate language in a contract
  ▪ Taking action – including termination of a business relationship – if a partner demonstrates a lack of respect for laws and policies
Hebrew Homes: $17 Million Settlement (June 2015)

- Hebrew Homes Health Network and affiliates settle with US Attorney, OIG and FBI in Florida; 5 year CIA
- No admission of liability
- Alleged kickbacks for medical director contracts and issues with therapy billing

Hebrew Homes

- Executive director agrees to leave organization
- Whistleblower, former CFO with non-profit for ten years, received $4.25 million
- Allegedly hired numerous physicians ostensibly as medical directors with contracts that specified numerous job duties and hourly requirements that were not done (“ghost positions”)
CF Watsonville East, LLC, and CF Watsonville West, LLC: $3.8 Million (May 2015)

- Owners, operators, and manager of 2 nursing homes in California
- 5 year CIA with monitor
- Alleged false claims for materially substandard or worthless services (2007-2012)
  - Persistently overmedicated residents
    - Causing infection, sepsis, malnutrition, dehydration, falls, fractures, pressure ulcers, and premature death

Extendicare Health Services Inc.: $38 Million (October 2014)

- 33 skilled nursing homes in 8 states
- Chain-wide 5 year CIA with monitor and IRO
- Allegedly billed for materially substandard skilled nursing services and failed to provide care that met federal and state standards of care and regulatory requirements
  - Failed to have a sufficient number of skilled nurses to adequately care for residents; failed to provide adequate catheter care; and failed to follow the appropriate protocols to prevent pressure ulcers or falls
Extendicare Health Services Inc.

- Resolves allegations that between 2007-2013, 33 SNFs provided medically unreasonable and unnecessary rehabilitation therapy services to Medicare Part A beneficiaries, particularly during patients’ assessment reference periods, to bill Medicare at the highest per diem rate possible

- 2 separate *qui tam* cases; whistleblower recover
  - $>1.8 million for RUGS upcoding case
  - $250,000 for worthless services case

Foundation Health Services, Inc. (FHS): $750,000 Medicaid Settlement (June 2014)

- Louisiana non-profit owns/manages 9 SNFs in 5 states
- Case started following central air conditioning failure during 2010 heat wave
- Alleged materially substandard and/or worthless services
  - Falls, pressure ulcers, infection control, med errors, activities of daily living, mental health treatment, call bell response, insufficient skilled nursing staff, inadequate equipment, needed capital expenditures
Foundation Health Services, Inc.

- 5 year CIA with monitor
- Applies to any SNF in which FHS or Richard Daspit, Sr., have an ownership or control interest and any SNF that enters into a Financial Services Agreement, or other agreement, or that is managed by FHS, Daspit, or any company in which Daspit has an ownership or control interest
- Compliance Officer shall not be the Administrator or Executive Director of a facility

GGNSC Holdings, LLC: $613,000 (Jan. 2013)

- Alleged false claims to Medicare, Medicaid, and Veterans Administration because it provided residents at 2 Golden Living Centers in Atlanta with inadequate and worthless monitoring, documentation, and prevention and treatment of wounds from January 1, 2006 – May 31, 2011
- 5 year CIA with monitor
Pediatric Services of America (PSA): $6.88 Million Settlement (Aug. 2015)

- Failed to disclose and return overpayments
- Submitted claims for home nursing care without documenting RN monthly supervisory visits
- Submitted claims that overstated the length of time staff had provided services

PSA: $6.88 Million Settlement

- First settlement under False Claims Act for failure to investigate credit balances to determine whether they resulted from federal overpayments made by a federal health care program

- Section 6402 of ACA requires providers to report and return any overpayments by the later of (i) 60 days after the overpayment was identified or (ii) the date any corresponding cost report is due (if applicable)
Resources


Resources


Contact Information

Paula G. Sanders, Esquire  
Cynthia A. Haines, Esquire  
Post & Schell, PC  
psanders@postschell.com  
chaines@postschell.com  
717-612-6027

Felicia Heimer, Senior Counsel  
Office of Counsel to the Inspector General  
U.S. Department of Health and Human Services  
Felicia.Heimer@oig.hhs.gov  
305-536-6927