

**CareSource**

**I AM YOUR BOARD MEMBER**

Please listen to me as to what Compliance education I need in order to serve as an effective Board Member

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**Speakers**

**Craig J. Brown**  
Board Member  
Managed Care Company

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EVP & General Counsel  
CareSource  
Dayton, Ohio

**CareSource**

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Washington, DC

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**From the Viewpoint of a Board Member**



- One** What initial and continuing education is needed?
- Two** What degree of transparency do I need from the MCO regarding compliance issues?
- Three** What do I need when a major compliance storm rolls in, including a DOJ investigation or CIA?

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## CONCEPTS 3 Ts

**1** | TRUST

- Of Management
- Must be earned

**2** | TRANSPARENCY

- By Management

**3** | Tone at the TOP

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## AGENDA

**I** | INTRODUCTION

**II** | CORPORATE GOVERNANCE BASICS

**III** | THE VIEW FROM THE BOARDROOM

**IV** | Q & A

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We are all responsible for compliance.

The Board is ultimately responsible for the organization's Effective Compliance Program.

Proper education for a Board Member is critical for an organization to have an Effective Compliance Program.

1. Medicare – CMS Issued Manual for Medicare Managed Care Organizations – 50.2.3
2. Medicaid – Title 42, Chapter IV, Subchapter C, Part 437, §438.608 – Program integrity requirements under the contract.
3. [https://oia.hhs.gov/compliance/compliance-guidance/docs/Health\\_Care\\_Directors\\_Compliance\\_Duties.pdf](https://oia.hhs.gov/compliance/compliance-guidance/docs/Health_Care_Directors_Compliance_Duties.pdf)
4. 2005 Organizational Sentencing Guidelines Section 8B2.1 (b)(2)(A) <http://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8>
5. <http://www.aac.com/legalresources/quickcounsel/eaecp.ctm#hid3>

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### CORPORATE GOVERNANCE BASICS

**Duty of Care**

- How informed do I need to be? How much of an inquiry do I need to make?
- Relying on management
- Relying on advisors

**Duty of Loyalty**

- Conflicts of interest
- Corporate opportunities

**Duty of Good Faith?**

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### Sources of Duties and Responsibilities

Common Law

State Corporation Law

Governing Documents  
Charter  
 Bylaws  
 Committee Charters  
 Codes of Conduct

Healthcare Related Laws & Regulations

Contracts

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### Who cares about fiduciary duties?

**Courts**  
U.S. Sentencing Commission Guidelines Manual

**Regulators**  
• DOJ  
 • OIG-HHS  
 • Insurance Dept.  
 • Dept. of Medicaid

**Plaintiff's bar and Out-Town Plaintiffs**

**Shareholders (Public or Private Company)**

**Funders (Not-for-profits)**

**Members / Customers**

**Reputation / The Public**

**Executive & Legislative Branch / Government**

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**DUTIES ON WHICH WE WANT TO FOCUS TODAY**

**TWO PARTICULAR ASPECTS OF THE DUTY OF CARE**

**THE DUTY OF OVERSIGHT –**  
*CAREMARK* – 698 A. 2d 959 (Del. Ch. 1996)

**THE DUTY TO BE INFORMED –**  
*SMITH v. van GORKUM* – 488 A. 2d 858 (Del. 1985)

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**DISCHARGE OF THESE DUTIES AS AN MCO BOARD MEMBER**

**FUNDAMENTAL UNDERSTANDING OF THE INDUSTRY**

**FUNDAMENTAL UNDERSTANDING OF THE INDUSTRY'S REGULATORY FRAMEWORK**

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**DISCHARGE OF THESE DUTIES AS AN MCO BOARD MEMBER**

**FUNDAMENTAL UNDERSTANDING OF THE EXPERTS ON WHOM THE DIRECTOR IS ENTITLED TO RELY**

- IN-HOUSE: GENERAL COUNSEL AND LEGAL STAFF
- IN-HOUSE: COMPLIANCE/ETHICS OFFICER AND STAFF
- IN-HOUSE: INTERNAL AUDIT FUNCTION
- IN-HOUSE: RISK MANAGEMENT FUNCTION
- OUTSIDE COUNSEL
- INDEPENDENT OUTSIDE AUDITORS
- COMPLIANCE EXPERTS AND CONSULTANTS

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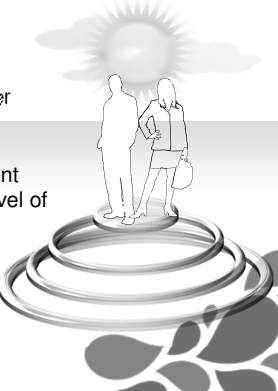
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**THE VIEW FROM THE BOARDROOM**

- Expertise & Qualifications
- Roles on Compliance & other Committees
- Training Opportunities
- Interactions with Management
- Investigations & Audits – Level of Detail
- Asking the Right Questions
- Seeking the Right Advisors
- Trends & Tracking



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**THE VIEW FROM THE BOARDROOM**

TONE AT THE TOP

COMPLIANCE EVENT LIFE-CYCLE

- POTENTIAL RED FLAGS
- FACTORS INFORMING DECISION TO RETAIN OUTSIDE COUNSEL
- ULTIMATE DECISIONS

MANAGING AND RESPONDING APPROPRIATELY TO AN IRO



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**Education Regarding:**


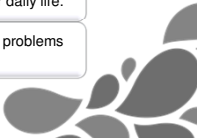
Organization's reporting system is adequate to insure the Board has appropriate information with respect to compliance with applicable laws.

Opportunity to discuss issues which encourage conversations.

Protect the Compliance Officer's Independence.

The Board exercises leadership by defining expectations, performance and culture. Compliance is a way of your daily life.

Building a culture that encourages self-identification of problems within the organization.

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### Educational Opportunities

- Best Practices for Audit Committee Seminar
  - Source: Corporate Compliance Seminars (several locations and dates)
  - Location: Indianapolis, IN / September 26, 2016, 8:45 – 12:30
  - Topics: Impact of recent and pending legislation resulting from the economic crisis and what's expected of audit committees in the current environment.
- Board Audit and Compliance Committee Conference
  - Source: Society of Corporate Compliance and Ethics
  - Location: Scottsdale, AZ / November 7-8, 2016
  - Topics: The latest on regulatory risk and compliance obligations, how to fulfill your fiduciary obligations as a board member and how to help improve your board performance.
- Managed Care Compliance Conference
  - Source: Health Care Compliance Association
  - Location: Scottsdale, AZ / January 29 – February 1, 2017
  - Topics: Learn essential information for those involved with the management of compliance at health plans.
- Board Audit Committee Compliance Conference
  - Source: Health Care Compliance Association
  - Location: Scottsdale, AZ / February 27-28, 2017
  - Topics: Fraud, Abuse & Compliance for 2017, what it takes to be a good board member and Enterprise Risk Management.




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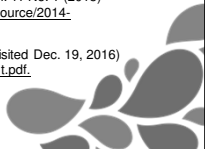
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### RESOURCE MATERIALS

- AHLA, *Health Care Compliance Resource Guide* (2014) [https://www.healthlawyers.org/Events/Programs/2014/Documents/Fraud\\_advertorial\\_2014.pdf](https://www.healthlawyers.org/Events/Programs/2014/Documents/Fraud_advertorial_2014.pdf).
- Catherine A. Martin and Amy Dilcher, *The Role of Health Care Directors in Compliance: A Practical Approach to Compliance Oversight and Responsibilities* HEALTHCARE FINANCIAL MANAGEMENT ASSOCIATION (2016) [http://www.ober.com/files/HFMA\\_Board\\_Governance\\_Presentation2016.pdf](http://www.ober.com/files/HFMA_Board_Governance_Presentation2016.pdf).
- Center for Healthcare Governance, *Competency-Based Governance: A Foundation for Board and Organizational Effectiveness* (2009) <http://www.americangovernance.com/resources/reports/brp/2009/brp-2009.pdf>.
- Clinton Mikel and Leslie Rojas, *The OIG's Practical Guidance for Health Care Governing Boards on Compliance Oversight*, ABA J. Vol. 11 No. 1 (2015) [http://www.americanbar.org/publications/aba\\_health\\_resource/2014-2015/June/oig.html](http://www.americanbar.org/publications/aba_health_resource/2014-2015/June/oig.html)
- HEAT and OIG, *A Toolkit for Health Care Boards* (last visited Dec. 19, 2016) <https://oig.hhs.gov/newsroom/video/2011/toolkit-handout.pdf>.




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### RESOURCE MATERIALS

- Jeffrey E. McFadden, *AHLA Executive Summary: Factors to Consider When Thinking About Retaining Outside Counsel on a Compliance Matter* (2016).
- OIG and AHLA, *An Integrated Approach to Corporate Compliance: A Resource for Health Care Organization Boards of Directors* (2004) <https://oig.hhs.gov/fraud/docs/complianceguidance/fab%204E%20Appendx-Final.pdf>.
- OIG and AHLA, *Corporate Responsibility and Corporate Compliance: A Resource for Health Care Boards of Directors* (2003) <https://oig.hhs.gov/fraud/docs/complianceguidance/040203CorpRespRscceGuide.pdi>.
- OIG and AHLA, *Corporate Responsibility and Health Care Quality: A Resource for Health Care Boards of Directors* (2007) <https://oig.hhs.gov/fraud/docs/complianceguidance/CorporateResponsibilityFinal%209-4-07.pdf>.
- OIG and AHLA, *Practical Guidance for Health Care Governing Boards on Compliance Oversight* (2015) <https://oig.hhs.gov/compliance/compliance-guidance/docs/Practical-Guidance-for-Health-Care-Boards-on-Compliance-Oversight.pdf>.




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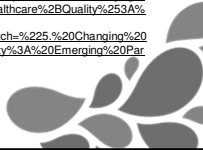
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## RESOURCE MATERIALS

- OIG and AHCA, *The Healthcare Director's Compliance Duties: A Continued focus on Attention and Enforcement* (2011) [https://oig.hhs.gov/compliance/compliance-guidance/docs/Health\\_Care\\_Directors\\_Compliance\\_Duties.pdf](https://oig.hhs.gov/compliance/compliance-guidance/docs/Health_Care_Directors_Compliance_Duties.pdf)
- Saul Helman, M.D., Doreen F. Shulman, *How to Communicate With the Board of Directors About Your Compliance Program*, BRISTOL-MYERS SQUIBB (2009)  
[http://www.ehcca.com/presentations/pharmacongress10/shulman\\_2\\_11.pdf](http://www.ehcca.com/presentations/pharmacongress10/shulman_2_11.pdf).
- Tracy E. Miller and Valerie L. Gutmann, *Changing Expectations for Board Oversight of Healthcare Quality: The Emerging Paradigm*, 2 J. of Health & Life Sci L. (2009)  
[http://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=1314&context=fac\\_schol&sei-redir=1&referer=http%3A%2F%2Fwww.bing.com%2Fsearch%3Fq%3D5.%2509Changing%2BExpectations%2Bto%2BBoard%2BOversight%2Bof%2BHealthcare%2BQuality%253A%2BThe%2BEmerging%2BParadigm%26are%3DIE](http://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=1314&context=fac_schol&sei-redir=1&referer=http%3A%2F%2Fwww.bing.com%2Fsearch%3Fq%3D5.%2509Changing%2BExpectations%2Bto%2BBoard%2BOversight%2Bof%2BHealthcare%2BQuality%253A%2BThe%2BEmerging%2BParadigm%26are%3DIE)  
<http://www.bing.com/search?q=225.%20Changing%20Expectations%20Board%20Oversight%20Healthcare%20Quality%3A%20Emerging%20Paradigm%22>




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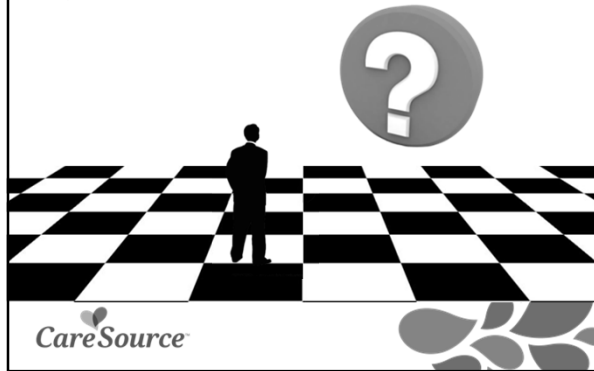
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## Questions




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## APPENDIX




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## Board Responsibility for Compliance

### Medicare

CMS Issued Manual for Medicare Managed Care Organizations – 50.2.3

The governing body (i.e Board of Directors, Board of Trustees etc.) may delegate compliance program oversight to a specific committee of the governing body (e.g., Board Audit Committee or Board compliance committee), but the governing body as a whole remains accountable for reviewing the status of the compliance program. The scope of the delegation from the full governing body to the governing body committee must be clear in the committee's charter and reporting.



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## Board Responsibility for Compliance

### Medicaid

Title 42, Chapter IV, Subchapter C, Part 438 §438.608 Program integrity requirements under the contract.

- (a) Administrative and management arrangements or procedures to detect and prevent fraud, waste and abuse.
- The State, through its contract with the MCO, PIHP or PAHP, must require that the MCO, PIHP, or PAHP, or subcontractor to the extent that the subcontractor is delegated responsibility by the MCO, PIHP, or PAHP for coverage of services and payment of claims under the contract between the State and the MCO, PIHP, or PAHP, implement and maintain arrangements or procedures that are designed to detect and prevent fraud, waste, and abuse. The arrangements or procedures must include the following:



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## Board Responsibility for Compliance

- (l) A compliance program that includes, at a minimum, all of the following elements:
  - i. Written policies, procedures, and standards of conduct that articulate the organization's commitment to comply with all applicable requirements and standards under the contract, and all applicable Federal and State requirements.
  - ii. The designation of a Compliance Officer who is responsible for developing and implementing policies, procedures, and practices designed to ensure compliance with the requirements of the contract and **who reports directly to the Chief Executive Officer and the board of directors.**
  - iii. **The establishment of a Regulatory Compliance Committee on the Board of Directors** and at the senior management level charged with overseeing the organization's compliance program and its compliance with the requirements under the contract.



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## Board Responsibility for Compliance

**Health Care Entities**  
OIG and AHLA

The health care entity governing board plays an important role in reconciling differing views (e.g., legislative, OIG, American Bar Association) regarding the proper role of the general counsel in health care compliance. The governing board should monitor the roles of the general counsel and the chief compliance officer in supporting the board's compliance oversight responsibilities.

Courts have consistently upheld the distinction between the duties of Boards of Directors and the duties of management. The responsibility of directors is to provide oversight, not manage day-to-day affairs.



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## Board Responsibility for Compliance

**Organizational Sentencing Guidelines**

The Organizational Sentencing Guidelines (OSG) makes it clear that the board plays a pivotal role in compliance. Among other things, the OSG require that "the 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."



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## Board Responsibility for Compliance

**Association of Corporate Counsel**

The organization's governing authority, should be knowledgeable about the content and operation of the [Compliance] Program and exercise reasonable oversight over its implementation and effectiveness. Specific individuals among high-level management should be assigned overall responsibility for the Program. One or more individuals should be assigned responsibility for the "day-to-day" operations of the program. Those individual(s) should have direct access to the governing authority and report to it periodically. This direct access is necessary to ensure that compliance information is channeled to those with the ultimate accountability for the organization. Those responsible for running the program should have adequate resources to operate the program effectively. What is deemed adequate will vary depending on the size and operations of the organization.



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