AGENDA

- Director Responsibilities
- Recent Rulings
- The “Yates Memo”
- Directors' Roles in Compliance
- Quality Oversight
HEALTH CARE FRAUD STATISTICS

- During Fiscal Year (FY) 2014, the Federal government won or negotiated over $2.3 billion in health care fraud judgments and settlements.
- Justice Department recovered over $3.5 billion from False Claims Act cases in FY 2015.
- New York-Presbyterian Hospital and Columbia University Medical Center together on May 7 have agreed to hand over a whopping $4.8 million to settle alleged HIPAA violations after the electronic protected health information of 6,800 patients wound up on Google back in 2010.

DIRECTOR RESPONSIBILITIES

- Duty of Loyalty
- Duty of Care
- Duty of Obedience
DUTY OF LOYALTY

- Act in good faith.
- Act in the best interests of the corporation.
- Conflicts of Interest
  - Recuse himself or herself when appropriate.

DUTY OF CARE

- Decision Making Function
  - Example: Medical Staff Credentialing Issues
- The Oversight Function
  - Keeping a finger on the pulse of the activities of the organization
- Quality of Care Issues
- Overseeing the Compliance Program
- The need to review corporate minutes
BUSINESS JUDGMENT RULE

- The rule provides that a director will not be held liable for a decision made in good faith, where the director is disinterested, reasonably informed under the circumstances, and rationally believes the decision to be in the best interests of the corporation.
- Courts will not second guess the board members.
- Can rely on information from management unless they have a reason to believe the reliance is unwarranted.

DUTY OF OBEDIENCE

- Understand the mission and purpose of the organization.
- Directors are charged with the obligation to further the purpose of the organization.
- The concept of quality of care is inseparable from the mission of the organization.
- To obey the laws the organization is subject to!
LIABILITY OF A DIRECTOR

- Liable for failing to reasonably oversee the organization’s Compliance Plan or for acting as mere passive recipients of information.

- Liability arises when:
  - The directors fail to implement any reporting or information systems or controls.
  - The directors consciously fail to monitor or oversee operations, thus disabling themselves from being informed of risks or problems requiring their attention.
  - Failure to provide oversight – not managing day-to-day affairs.

RECENT RULINGS

- **In re: Caremark**
  - Directors are potentially liable for a breach of duty to exercise appropriate attention if they knew, or should have known, that employees were violating the law, declined to make a good faith effort to prevent the violation, and the lack of action was the proximate cause of damages.

- **In re: Intuitive Surgical**
  - The Court held that Plaintiff offered sufficient particularized factual allegations that strongly support an inference that the entire board, or at least a majority, knew of violations of law committed by Intuitive and did nothing.
THE YATES MEMO

- Sally Quinlan Yates
  Deputy Attorney General
- Issued September 9, 2015

THE YATES MEMO (Cont’d)

- Six key steps that strengthen pursuit of individual corporate wrongdoing:
  - Cooperation credit requires identification of all individuals responsible for the misconduct;
  - Investigations should focus on individuals from the investigation’s inception;
  - Criminal and civil attorneys should communicate with each other during the investigation;
THE YATES MEMO (Cont’d)

- Six key steps continued:
  - The DOJ will only release culpable individuals in extraordinary circumstances or in accordance with DOJ policy;
  - DOJ will not resolve matters without a clear plan to resolve related individual cases;
  - Civil attorneys should focus on individuals to evaluate whether to bring suit against an individual beyond consideration of ability to pay.

HOW A CORPORATION SHOULD RESPOND

- Communicate and Educate
- Focus on the Compliance Program
- Address non-compliance promptly and appropriately
- Be prepared for more complex and drawn out investigations and settlement negotiations
- Prepare and issue Upjohn warnings
BEST PRACTICES OF INTEGRATING DIRECTORS INTO A COMPLIANCE PROGRAM

- Act in good faith to exercise its oversight responsibility and make inquiries;
- Familiarize themselves with and follow the Federal Sentencing Guidelines, OIG’s voluntary compliance program guidance documents, and OIG Corporate Integrity Agreements (CIAs);
- Stay abreast of the ever-changing regulatory landscape and operating environment;
- Raise their level of substantive expertise with respect to compliance matters by director selection and by consulting with experts;

BEST PRACTICES (Cont’d)

- Receive regular reports regarding the organization’s risk mitigation and compliance efforts from those responsible for audit, compliance, human resources, legal, quality, and information technology;
- Conduct “executive sessions” with leadership from compliance, legal, internal auditing, and quality functions to encourage more open communication;
- Be informed of emerging trends in the health care industry to increase transparency
  - CMS Quality Compare Measures
  - Sunshine Act
BEST PRACTICES (Cont’d)

- Establish a committee or subset of the Board to monitor Compliance Program operations and regularly report to the Board;
- Have the Code of Conduct operate as a constitution for the organization;
- Ensure the proper infrastructure, power and reporting structure for the Compliance Program;
- Participate in compliance training;
- Ensure the Compliance Program has a standard for responding to violations; and
- Ensure the Compliance Program includes guidelines for reporting a violation.

QUESTIONS?