Climbing the Corporate Ladder: Looking Up the Chain of Command in Fraud & Abuse Investigations

2011 HCCA Compliance Institute Program
Long-Term Care Track

Program Agenda

I. The Evolution of Corporate Responsibility
   A. Historical View
   B. Current View

II. Enforcement Examples

III. Practical Implications and Responses
The Evolution of Corporate Leadership Responsibility

Old School


  - Absent cause for suspicion, there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists.
New School


• The Guidelines are designed to further two key objectives:
  – Just punishment – is intended to ensure that the punishment received corresponds to the degree of *blameworthiness of the offender*.
  – Deterrence – is intended to provide incentives for organizations to *detect and prevent* offenses.

Sentencing Guidelines

• The Guidelines are based on “Culpability Scores” which are used to measure and determine the organization’s punishment.

• Culpability Scores are subject to enhancements or reductions.

• This “carrot and stick” approach provided the underpinnings for compliance program guidance authored by various government agencies.
The Ability to Mitigate

- The Organizational Federal Sentencing Guidelines allow organizations to mitigate sentences if they can demonstrate adherence to seven (7) elements that evidence an effective compliance program.

- Additionally, mitigation can also be accomplished by self-reporting, cooperation (with the government), and acceptance of responsibility.

The Ability to Mitigate (cont.)

- For example:
  - Companies that self report and fully cooperate with the government can receive up to a five (5) point reduction under section 8C2, 5(g)(i).
  - The “report” must be made prior to the imminent threat of disclosure or government investigation and within a reasonably prompt time after becoming aware of the offense.
  - The company must clearly demonstrate recognition and affirmative acceptance of responsibility for its conduct.
The Ability to Go From Bad to Worse

- An organization’s sentence can be harsher when:
  - High-level personnel participated in or condoned the wrongdoing.
  - The organization had a recent prior history of similar misconduct.
  - The organization willfully obstructed or attempted to obstruct justice during the investigation, prosecution, or sentencing stages.

A Duty to be Active Monitors


- Directors were alleged to have breached their fiduciary duty of care by allowing a situation to develop and continue which exposed the corporation to liability and in doing so they violated a duty to be active monitors of corporate performance.
- The Court noted that, “any rational person attempting in good faith to meet an organizational governance responsibility would be bound to take into account [the Guidelines] and the enhanced penalties and the opportunities for reduced sanctions that [they] offer.”
A Duty to be Active Monitors *(cont.)*


- “A director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.”

Got Compliance Era

Ostrich-like behavior does not conform to modern day standards of corporate responsibility and ethics.
Preventive Compliance Measures


  - Decision did not reach the merits of the shareholder’s claims, but is nonetheless insightful.
  - In a case alleging a failure to take preventive compliance measures, shareholders need not allege that directors acted with an intent to harm the company; they need only allege that they acted recklessly.

Failure to Dig Deeper?

The court in McCall v. Scott noted that at least certain board members should have been sensitive to various “red flags that warned of the systematic fraudulent practices employed and encouraged by Columbia management.”

• Members of the audit committee had reviewed audit reports that showed “unmistakable signs that improper practices were being employed.”
• That some members had personal knowledge of the company’s allegedly improper acquisition tactics.
• That the company had been named in a qui tam action, which, though dismissed, clearly presented claims of improper practices.
Department of Justice Guidelines

- 2003 – DOJ publishes Guidelines Regarding the Federal Prosecution of Corporations

- Factors to be considered:
  - Nature and seriousness of the offense;
  - Pervasiveness of the wrongdoing within the entity;
  - History of similar conduct;
  - Timely and voluntary disclosure of wrongdoing and willingness to cooperate with the government’s investigation;
  - Existence and adequacy of the corporation’s compliance program;
  - Remedial actions taken by the corporation;
  - Collateral consequences of a conviction;
  - Adequacy of the prosecution of the individuals responsible;
  - Adequacy of non-criminal alternatives.

Failure to have an Effective Compliance Program

  - Court held that an assertion that a company failed to maintain an effective corporate compliance program is sufficient, under the False Claims Act, to allege the company submitted false claims with “reckless disregard” of their falsity, even though there is no allegation that upper management had actual knowledge that false claims were being submitted.
The Ever Increasing Focus on Organizational Culture and Leadership

  
  – Exercise due diligence to prevent and detect criminal conduct; and otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Culture and Leadership (cont.)

• 2008 - HHS-OIG issues a draft document entitled “Supplemental Compliance Program Guidance for Nursing Facilities.” (See, 73 FR 20680, April 16, 2008). This document is intended as a supplement to the original guidance issued in 2000.

• Specific discussion regarding 42 CFR part 483 shows that regulatory lapses can result in fraud enforcement aimed at the entity’s leadership.
  
  – “It is essential that key members of the organization understand these requirements and support their facility’s commitment to compliance with these regulations.”
Culture and Leadership (cont.)

- Other specific references to leadership and ethic culture in the OIG’s CPG for Nursing Facilities include:
  - “First, and foremost, a nursing facility’s leadership should foster an organizational culture that values, and even rewards, the prevention, detection, and resolution of quality of care and compliance problems.”
  - “The nursing facility should endeavor to develop a culture that values compliance from the top down and foster compliance from the bottom up. Such an organizational culture is the foundation of an effective compliance program.”

Culture and Leadership (cont.)

- 2010 – Amendments to the Federal Sentencing Guidelines for Organizations.

  The amendments add a new provision which allows an entity to receive a three (3) point reduction in culpability score for maintaining an effective compliance program even in cases where the government has determined that at least one (1) individual meeting the definition of “high-level personnel” was involved with, condoned, or was otherwise willfully ignorant of the underlying criminal activity.
Culture and Leadership (cont.)

- If four conditions are met:
  - First, the individual or individuals with operational responsibility for the compliance program had direct reporting obligations to the organization’s governing authority or subgroup thereof;
  - Second, the amendments require that the compliance program detected the offense before it was discovered outside the organization or before such discovery was reasonably likely;
  - Third, that the organization promptly reported the offense to the appropriate governmental authorities; and,
  - Fourth, that no individual with operational responsibility for the compliance program participated in, condoned, or was willfully ignorant of the offense.

Corporate Leadership Liability

- OIG’s Permissive Exclusion Authority Under Section 1128(b)(15)(A)(ii) allows for the exclusion of Owners, Officers and Managing Employees of an sanctioned entity, (i.e.) an entity that has been convicted of certain offenses or excluded from participation.

- For Owners the statute requires evidence that the owner knew or should have known of the conduct that formed the basis for the sanction.

- When such evidence exists, the OIG will operate with a presumption in favor of exclusion.
Corporate Leadership Liability
(cont.)

• For Officers and Managing Employees the statute includes no knowledge element. Therefore, the OIG has the right to exclude every officer and managing employee of a sanctioned entity.

• However, the OIG has stated that while there is no knowledge requirement, if the officer or managing employee knew or should have known of the conduct, it will operate with a presumption in favor of exclusion.

Corporate Leadership Liability
(cont.)

• Managing Employee is defined broadly as individuals (including a general manager, a business manager, an administrator, or a director) who exercises operational or managerial control over the entity or who directly or indirectly conducts the day-to-day operations of the entity.

• With this in mind, it could prove difficult for individuals meeting the definition of a Managing Employee to extricate themselves from an allegation that they “should have known” about the underlying misconduct.
Corporate Leadership Liability (cont.)

• In determining whether to exclude an Owner, Officer or Managing Employee, the OIG has stated that it will consider:
  - The circumstances of the misconduct and seriousness of the offense;
  - The individual’s role in the sanctioned entity;
  - The individual’s actions in response to the misconduct; and,
  - General facts about the sanctioned entity’s structure and history, such as whether “the sanctioned entity or a related entity had previously been convicted of a crime or otherwise found liable for an offense.”

Corporate Leadership Liability (cont.)

• Strengthening Medicare Anti-Fraud Measures Act of 2010.

• Introduced by P. Stark and W. Hedger H.R. 6130 as proposed is intended to address certain perceived gaps that currently exist under the OIG’s permissive exclusion authority.
  - First, while Executives from companies that are convicted of fraud can be excluded from Medicare under current law, if the executive has left the company by the time of conviction, he or she may be able to avoid potential exclusion.
  - Likewise, parent corporations are not often held accountable for the fraudulent or abusive conduct of their subsidiaries.
Corporate Leadership Liability

(cont.)

• If passed, H.R. 6130 would permit the OIG to exclude corporate officers, executives, managing employees and parent/related entities from participation, if they were affiliated with the now sanctioned entity at the time any of the conduct forming the basis of conviction or exclusion of the sanctioned entity occurred.

• Thus, the OIG would have the ability to reach back and re-attach a former corporate officer, executive or managing employee to the sanctioned entity.

Corporate Leadership Liability

(cont.)

• The Responsible Corporate Officer Doctrine

  - Founded in two Supreme Court cases:
    - United States v. Park (1975); United States v. Dotterweich (1943)
  - Premised on the theory that certain corporate officials have a “positive duty to seek out and remedy violations when they occur ... and implement measures that will ensure that violations will not occur.”
    - The doctrine does not require a showing that the targeted officials had knowledge of or had participated in the alleged wrongdoing.
Corporate Leadership Liability (cont.)

- In *Park*, the Court noted that a corporate officer cannot be convicted under this doctrine merely because of his or her position in the company.

- Rather, a relationship must exist between the officer’s corporate functions and the conduct in question.

- Basically, a corporate officer could be held personally accountable for criminal acts of the corporation if the officer had “the power to prevent or correct violations.”

Corporate Leadership Liability (cont.)

- Collective knowledge
  - A corporation may be held criminally liable for conduct even though no single agent intended to commit the offense or even knew the operative facts that constituted the violation.
  - The intent and knowledge of various agents may be collectively attributed to the corporation, thereby giving rise to corporate criminal liability where no individual criminal liability would exist.
Corporate Leadership Liability (cont.)

- What the Government looks for in cases involving corporate leaders when investigating Long-Term Care providers:
  - Notice, warning, failure to act/respond;
  - Gross and/or systemic failures or conditions;
  - Evidence of profits over patient care;
  - Institutional history and reputation.

Enforcement Examples
Enforcement Examples (cont.)

• Cathedral Rock Nursing Homes, St. Louis, Missouri
  - January 2010 criminal and civil settlement involving allegations of failure to provide adequate care to Medicare and Medicaid residents.
  - Over $1.6 million paid to resolve civil and criminal allegations.
  - Majority owner enters a deferred prosecution agreement.

Enforcement Examples (cont.)

• Cathedral Rock Nursing Homes, St. Louis, Missouri (cont.)
  - Admitted conduct includes:
    * Failure to staff at certain times at a level that was not sufficient to provide adequate care.
    * Failure provide appropriate wound care at all times.
    * Falsifying medical records to indicate services were provided when they had not been provided via “charting parties.”
    * Submitting claims for worthless services.
Enforcement Examples (cont.)

- **Purdue Frederick – OxyContin Case**
  - 2007 COO, CSO, and General Counsel pleaded guilty as responsible corporate officers to one (1) count of misdemeanor misbranding; Corporation pleaded guilty to felony misbranding.
  - 2009 ALJ Affirms 12 year Exclusion of all three (3) corporate officers.
  - 2010 federal district court in Washington, D.C. upholds all three (3) exclusions.

Enforcement Examples (cont.)

- In July 2009 two former Synthes executives each pleaded guilty to one (1) misdemeanor violation of the Food Drug and Cosmetic Act relative to introducing adulterated and misbranded Norian XR into interstate commerce.

- The executives included the former president and COO of Synthes’ spine division as well as the director of regulatory and clinical affairs for the spine division.

- Norian Corporation paid a $22.5 million fine under a plea agreement and its parent Synthes, Inc. agreed to pay a $669,800 fine related to the same underlying conduct.
Enforcement Examples (cont.)

- United States of America v. Dr. Aziz Awad
  - Convicted of 24 counts of participating in a scheme to defraud Medicare under 18 U.S.C. Section 1347.
  - Lack of appropriate physician supervision of respiratory therapies.
  - Providing and ordering medically unnecessary services.

U.S. Court of Appeals for the Ninth Circuit upholds two level sentencing enhancement under the federal sentencing guidelines for “conscious or reckless risk of death or serious bodily injury.”

- Enhancement only requires the creation of risk, not the infliction of injury which was the case here as the consistent failure to supervise jeopardized patients.

Practical Implications and Responses

Understand, Lead, and Create
Leaders Should Understand

• That the buck truly does stop with them – Fiduciary duties cannot be avoided by ignoring allegations.

• That increased funding, better use of technology, enhanced cooperation and coordination has resulted in more effective and efficient enforcement.

• That State and Federal enforcement agencies have become particularly astute at evaluating potential investigative targets (and in many cases beginning criminal and/or civil investigations) prior to stepping foot on the targeted provider’s property.

Leaders Should Understand (cont.)

• That their practices are transparent to the government – an agent on every shoulder.

• That clinical criteria and evidence based practice drive medical necessity.

• That they must be prepared to take intelligent and rational positions to support their practices.

• That they must be prepared to react quickly and effectively to alleged or identified overpayments – the eagle and the windbreaker.
Leaders Should Lead

• Leaders should demand and support effective Compliance and Ethics Programs.

• Leaders should exercise positive authority in the area of compliance and not merely be a passive observer.

• Leaders should understand the extent to which the strength of the organization’s compliance operation has a direct impact on the way in which their organization responds to government investigations and/or enforcement actions.

Leaders Should Lead (cont.)

• Program effectiveness should be continuously monitored by leadership.

• Internal investigations should be robust and forthright.
  - Include both interim and final recommendations;
  - Contain/control ongoing acts of non-compliance;
  - Limit exposure and related damage;
  - Take advantage of “good provider” opportunities;
  - Opportunity to refund identified overpayments;
  - Opportunity to self-disclose.
Leaders Should Create a Compliant Culture

- Corporate culture is critical to the success (or failure) of an Organization’s compliance.

- Leadership creates the culture, culture drives effectiveness.

- The role of leadership cannot be understated and must be understood.
  - Does leadership embrace or merely tolerate compliance and ethics?
  - How are compliance officials treated and received?
  - How has leadership demonstrated its ability to deal with bad news?
  - How has leadership shown its willingness to take responsibility?

Leaders Should Create a Compliant Culture (cont.)

- Creating and maintaining an ethical culture removes uncertainty thereby promoting internal reporting.

- Employees that report suspected misconduct, should be encouraged, supported, and protected.
  - Positive outcomes normally flow from positive behaviors.
  - The information that is being offered is a valuable gift, treat it that way.
Leaders Should Create a Compliant Culture (cont.)

- Perfection is Not Required, But Good Faith Is.
- Good faith explained – ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one’s duty or obligation.
  - Actions speak louder than words.
  - Do your actions support the “good faith” state-of-mind?

- What is your Code of Conduct?
  - Words on the page or the basis of the corporation’s culture.

- Is it your habit to run down the sidelines?

Thank you.

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