



## Doubling Down on Compliance: Working With Your Board to Maximize the Win!



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Katherine Matos

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### Agenda



- Board Fiduciary Duties
- Regulatory Environment/ Risks
- Other Components of the Annual Report

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### Ideal Board Member



• What qualities are you looking for in the ideal board member?



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### A Boy Scout Is:



- Trustworthy
- Loyal
- Helpful
- Friendly
- Courteous
- Kind
- Obedient
- Cheerful
- Thrifty
- Brave
- Clean
- Reverent

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### Ideal Board Member



- Engaged
- Knowledgeable of the industry
- Experienced and mature
- Diversity
- Sufficient independence
- Good judgment

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### Fundamental Duties of Directors



- A director has three basic duties:
  - Duty of Loyalty**
  - Duty of Care**
  - Duty of Obedience**
- This means a director must perform his/her duties:
  - In *good faith*
  - In a manner he/she reasonably believes to be in the *best interests of the corporation*, and
  - With the *care an ordinarily prudent person would exercise* under similar circumstances.
- A director can reasonably rely on information presented by officers, employees, legal counsel, accountants and other experts, unless he/she knows such reliance is unwarranted.

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## OIG Guidance for Directors



**CORPORATE RESPONSIBILITY AND CORPORATE COMPLIANCE:**  
*A Resource for Health Care Boards of Directors*



THE OFFICE OF INSPECTOR GENERAL OF THE  
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES  
AND  
THE AMERICAN HEALTH LAWYERS ASSOCIATION

**AN INTEGRATED APPROACH TO CORPORATE COMPLIANCE**  
*A Resource for Health Care Organization Boards of Directors*



United States Department of Health and Human Services  
Office of Inspector General  
American Health Lawyers Association

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## Business Judgment Rule



- Courts will not second-guess board decisions (no matter how wrong) if directors are disinterested, reasonably informed, and rationally believe the decision to be in the company's best interest
- Presumption of good faith absent "reckless indifference or deliberate disregard"
- Reasonably informed requires reasonable inquiry, NOT "roving reporter"

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## Federal Sentencing Guidelines



"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."

- *Federal Sentencing Guidelines*, "Sentencing of Organizations" at §8B2.1(b)(2)(A).

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### In re Caremark Decision



"[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 the 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."

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### Walt Disney Co. Decision



- Aug. 9, 2005 decision by Del. Chancery Court was strong affirmation of business judgment rule
- Presumption that directors acted in good faith unless plaintiff presents evidence of "reckless indifference or deliberate disregard"
- Directors' adherence to **reasonable process** is key:  
"Compliance with a director's duty of care can never appropriately be judicially determined by reference to the **content** of the board decision that leads to the corporate loss, apart from consideration of the good faith or rationality of the **process** employed."
- Life Link III Board members rely on the compliance program as the reasonable process to prevent and detect crime and promote an ethical culture

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### 2015 Guidance: Practical



- Addresses issues relating to the Board's oversight and review of compliance
  - Expectations
  - Roles and responsibilities
  - Issue reporting
  - Regulatory risk
  - Accountability



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## Board Oversight



*Boards should be actively engaged in oversight of compliance*

- Accountable to shareholders and communities
- Government incentives for self-policing
- Select and guide the management of the organization

*OIG recognizes that compliance program design will depend on the size, resources, and complexity of the organization.*

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## Compliance is a Team Sport



- Compliance
- Legal
- Audit
- Human Resources
- Quality Improvement
- Risk Management
- Clinical Departments
- Sales, Marketing, Business



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## Compliance is a Team Sport



*Think about your own organization*

- Who is involved in the following?
  - Identifying compliance risks
  - Investigating compliance risks
  - Designing and implementing appropriate corrective actions and decision-making
- How do the departments in your organization communicate throughout the process?
- How is the Board informed?



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## Everyone Plays on This Team



- Use compliance metrics to evaluate organizational performance
  - Scorecard assessing Structure, Process, and Outcome
- Make compliance a part of employee performance
  - Eligibility for bonuses
  - Clawback/recoupment provisions
  - Performance improvement plans
- Management certifications

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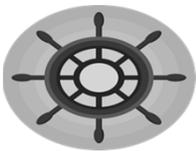
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## Informed Decisions...



*... require information!*

- How does your board get information?
- From what sources?
- What kind of information?
- How do they keep abreast of external changes?

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## Our Suggestions



- Consultation with outside regulatory, compliance, or legal professionals
- Regular reporting of predetermined data
- Risk-based reporting
- Multiple reporting streams
- Use of scorecards or dashboards

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## Effective programs proactively identify risks



- What are your risk areas?
- What tools are in your toolkit?

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## What are your risk areas?



### Industry

What arrangements or reimbursement structures you deal with?

### Organizational

How is your organization structured?

### Historical

Have prior audits identified a risk?

### Circumstantial

Have you received reports from employees or others?

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## What tools are in your toolkit?



- Internal or external audits
- Employee reporting
- Management and employee surveys
- Public data from comparable institutions
- Public reports of enforcement actions



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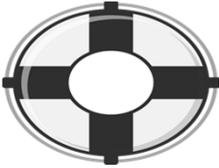
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## Corrective Action

- Team approach to problem solving
- 60 Day Rule for overpayments
- Disclosure to the government




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## The Yates Memo

Directs prosecutors to:

- Focus on *individuals* in investigating allegations of corporate misconduct, and
- To hold *individuals* accountable in resolving criminal prosecutions and civil actions arising out of corporate misconduct




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## The Yates Memo

Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. **They**

These letters... Contributions between the Department's civil and criminal attorneys, together with agency attorneys, provide a comprehensive view of the full range of the government's potential remedies... Criminal attorneys handling corporate investigations should identify civil attorneys as early as possible... Department attorneys should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. The same principle applies to civil resolutions... Any such release of civil liability that is a condition to a corporate resolution must be personally approved in writing by the relevant Assistant Attorney General in United States Attorney's Office.

**4. About corporate resolutions, no corporate resolution will provide protection from criminal or civil liability for any individuals.**

These steps to increase accountability... Department attorneys should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. The same principle applies to civil resolutions... Any such release of civil liability that is a condition to a corporate resolution must be personally approved in writing by the relevant Assistant Attorney General in United States Attorney's Office.

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## Other Components of the Annual Report



- Ethics – Importance of the Tone at the Top
- Recognition for Compliance Leadership
- Closed session –
  - Anything else or any additional risks you need to tell us without management?
  - Do you have the resources to accomplish your compliance goals
  - Can you effectively work with management to address compliance concerns?

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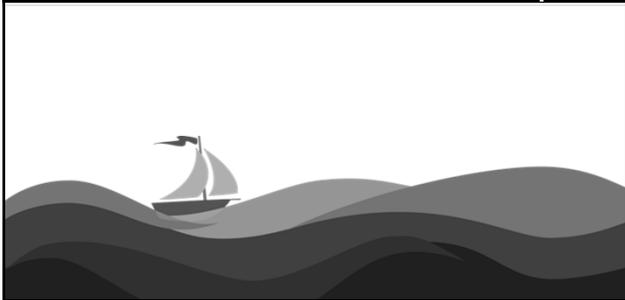
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## Questions?



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