New RoPs: The Role of the Board and Compliance in the Facility Assessment Process and Risk of Non-Compliance

Compliance Institute
April 15-18, 2018
Las Vegas, NV

Presenters

- Christine Zack, Chief Strategy & Business Development Officer, The AMD Card
- Linda W. Taetz, Senior Vice President, Chief Compliance Officer, Mariner Health Central, Inc.

Goals and Objectives

- Discuss key indicators of dashboard for implementation and reporting to the Board and Compliance
- Evaluate effective assessment strategies
- Identification of high risk areas of noncompliance

Facility Assessment Part 1
F Tag 383

- The facility assessment shall include specific evaluation of key areas such as;
- Resident Census
- Facility capacity with imposed restrictions as applicable
- Specific resident population demographics (i.e. specific diseases, diagnosis, cognitive conditions, specialty clinical populations, infections, behaviors, et al)

Facility Assessment Part 2
F Tag 838

- Staff Competencies including nursing and non-nursing personnel as it relates to the resident populations needs
- Cultural, ethnic and religious needs
- Specific services as resources for the provision of services such as pharmacy, rehabilitation, behavioral health, respiratory needs and other special services
- Other resources such as physical plant, equipment (medical and non-medical)
- Access to services via third parties and correlating provisions of services day to day and emergency situations, including the review of said agreements with provision inclusions

Facility Assessment Part 3
F Tag 838

- Training Program Evaluation
- Health information and technology and sharing information
- Completion of community and facility risk assessment, utilizing an all hazards approach in conjunction with required emergency preparedness plan
- Process for identification of gaps in performance related to adverse events
- Integration into the facility QAPI Process
- Monitoring of the plan on an annual basis or upon a change in the facility's operation that would require substantial modification

THE ROLE OF GOVERNING ENTITIES IN COMPLIANCE

▶GOVERNING BODY

- Established through OBRA
- Condition of participation
- New QAPI requirements under Phase II
- Day-to-Day Operational Control

GOVERNING BOARD

- Established through state law, i.e. Delaware General Corporation Law
- Different corporate forms have different types of a governing board. E.g. Inc - Board of Directors
- Strategic oversight – monitoring & ratification

GOVERNING BODY & COMPLIANCE

- Best Practice: 2 way communication between facility-level governing body and organization's Compliance Department
- What are the Compliance-related obligations of the Governing Body

42 CFR §483.70 Administration

- **(d)*Governing body*.**
- **(1)** The facility must have a governing body, or designated persons functioning as a governing body, that is legally responsible for establishing and implementing policies regarding the management and operation of the facility; and
- **(2)** The governing body appoints the administrator who is - **(i)** Licensed by the State, where licensing is required; **(ii)** Responsible for management of the facility; and **(iii)** Reports to and is accountable to the governing body.
- **(3) The governing body is responsible and accountable for the QAPI program, in accordance with § 483.75(f).**

CFR §483.75(f) Quality assurance and performance improvement

(a) ***Quality assurance and performance improvement (QAPI) program***. Each LTC facility, including a facility that is part of a multiunit chain, must develop, implement, and maintain an effective, comprehensive, data-driven QAPI program that focuses on indicators of the outcomes of care and quality of life

COMPLIANCE & QAPI

QAPI	COMPLIANCE
▶ Part of the Day-to-Day Operations	▶ Strategic oversight of an entire organization's systems and processes
▶ Involves granular root cause analysis of quality outcomes at a facility	▶ Identifies problem areas through audits or through facility reports
▶ Identifies problem areas AND reports to Compliance OR receives from Compliance	▶ Conducts investigations and directs facilities to conduct root cause analysis
▶ Creates Performance Improvement Plans	▶ Champions corporate integrity and ethical behavior

SUMMARY: THE ROLE OF THE GOVERNING BODY IN COMPLIANCE

ESTABLISHES AND/OR IMPLEMENTS FACILITY POLICIES INCLUDING COMPLIANCE STANDARDS OF CONDUCT

ESTABLISHES & RETAINS RESPONSIBILITY FOR QAPI PROGRAM WHICH REPORTS PROBLEMS TO COMPLIANCE AND RESPONDS TO REQUESTS FROM COMPLIANCE FOR ROOT CAUSE ANALYSIS AND PERFORMANCE IMPROVEMENT PLANS

GOVERNING BOARD & COMPLIANCE

- Best Practice: Chief Compliance Officer reports to the Board of Directors
- More complicated than Governing Body Analysis
  - What are the obligations of the Board of Directors?
    - Duties imposed by statute and common law
    - Duties suggested by OIG & collaborative associations
  - Which Governing Board?
    - Facility?
    - Management or Consulting Company?
    - Parent Company?

CORPORATE LAW ON DIRECTORS : STATUTORY LAW: DGCL §141(a)

(a) The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors

BOARD OF DIRECTORS DUTIES COMMON/CASE LAW: FIDUCIARY DUTY

OVERARCHING PRINCIPLE: FIDUCIARY DUTY

A legal obligation of a director to act in the best interests of the corporation

BOARD OF DIRECTORS DUTIES
COMMON/CASE LAW: DUTY OF CARE

DUTY OF CARE

A Director must make informed decisions by taking an active role in the decision-making process.

INVESTIGATE/CONSULT
DELIBERATE/DISCUSS

BOARD OF DIRECTORS DUTIES
COMMON/CASE LAW: DUTY OF LOYALTY

DUTY OF LOYALTY

A director must place the interests of the corporation above his/her own personal interests

BOARD OF DIRECTORS DUTIES

COMMON/CASE LAW: BUSINESS JUDGMENT RULE

BUSINESS JUDGMENT RULE

Generally, a Court will not review business decisions if Directors performed their duties

1. In **Good Faith**
2. With **Ordinary Care**
3. With **Reasonable Belief** Decision was **In the Best Interests of the Company**

BOARD OF DIRECTORS & COMPLIANCE
OIG & COLLABORATIVE ASSOCIATIONS

PRACTICAL GUIDANCE FOR HEALTH CARE GOVERNING BOARDS ON COMPLIANCE OVERSIGHT

OIG

HCCA

AHLA

AHIA

https://oig.hhs.gov/compliance/compliance-guidance/docs/Practical-Guidance-for-Health-Care-Boards-on-Compliance-Oversight.pdf

EXPECTATIONS FOR
BOARD OVERSIGHT OF COMPLIANCE PROGRAM
FUNCTIONS: INFORMATION GATHERING

"A critical element of effective oversight is the process of asking the right questions"

"Burying your head in the sand"

Purposefully avoiding questions that might expose compliance issues represents improper board oversight

EXPECTATIONS FOR
BOARD OVERSIGHT OF COMPLIANCE PROGRAM
FUNCTIONS: GOOD FAITH OVERSIGHT

- A Board must act in good faith in the exercise of its oversight responsibility for its organization, including making inquiries to ensure:
  - (1) a corporate information and reporting system exists and
  - (2) 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.

In re Caremark Int'l, Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

EXPECTATIONS FOR
BOARD OVERSIGHT OF COMPLIANCE
PROGRAM FUNCTIONS: ENGAGEMENT

"Although Compliance program design is not a 'one size fits all' issue, Boards are expected to put forth a meaningful effort"

EXPECTATIONS FOR
BOARD OVERSIGHT OF COMPLIANCE PROGRAM
FUNCTIONS: BASELINES & BENCHMARKS

RESOURCES

OIG CORPORATE INTEGRITY AGREEMENTS

OIG COMPLIANCE GUIDANCE

https://oig.hhs.gov/compliance/compliance-guidance/index.asp

FEDERAL SENTENCING GUIDELINES

https://oig.hhs.gov/compliance/compliance-guidance/index.asp

EXPECTATIONS FOR
BOARD OVERSIGHT OF COMPLIANCE PROGRAM
FUNCTIONS: PROMOTING COMPLIANCE

CULTURE OF COMPLIANCE

"Compliance is an enterprise-wide responsibility."

USE OF INCENTIVES & BONUSES TO AWARD PROMOTION OF AND ADHERENCE TO STANDARDS OF CONDUCT AND OTHER COMPLIANCE GOALS

SUMMARY: THE ROLE OF THE BOARD OF DIRECTORS IN COMPLIANCE

STRATEGIC ADVISORY & OVERSIGHT

Does Not Manage Day-to-Day Operations

INFORMATION GATHERING

GOOD FAITH OVERSIGHT

ENGAGEMENT

BASELINES & BENCHMARKS

PROMOTING A CULTURE OF COMPLIANCE

FINAL DILEMMA: WHICH BOARD OF DIRECTORS?

FACILITY?

Yes!

MANAGEMENT/CONSULTING COMPANY?

Maybe. Check the contract

PARENT COMPANY?

Depends on the organization structure

The Risks of Non-Compliance

- Regulatory
- Operational
- Legal