Fraud & Compliance Forum

The Role of Boards of Directors and How to Interact with Them

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Notes:

Goals of the Presentation

- Compare and contrast the perspectives of OIG lawyer, compliance officer, and outside lawyer on the role of Boards of Directors with respect to organizational compliance and compliance programs
- Discuss legal standard of conduct applicable to Boards
- Review the OIG's guidance documents on the role of Boards
- Explore best practices for educating diverse Board members about relevant risks and issues
- Hear practical tips for interacting with Boards

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Notes:

Legal Standard of Conduct Applicable to Boards

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Notes:

Delaware Law and Caremark Standard of Conduct

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Notes:

Caremark Case (1996)

- *Caremark* involved review of a settlement of a shareholder derivative claims premised on company's guilty plea and payment of criminal and civil penalties for violate of federal and state health care fraud and abuse laws and subsequent imposition of corporate integrity agreement.
- Court held that directors could be held liable in limited circumstances for losses caused by noncompliance with appliable legal standards
- … but Court made clear it was high bar

  "only a sustained or systemic failure of the boad to exercise oversight – such as an utter failure to attempt to assure a reasonable information and reporting system exists – will establish the lack of good faith that is a necessary condition of liability"

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

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Notes:

What is Caremark Standard of Conduct in Practice?

To attempt in good faith to assure that:

a) a corporate information and reporting system, which the board concludes adequately exists; and

b) this system is sufficient to assure that appropriate information regarding organizational compliance with applicable laws will come to the board's attention in a timely manner and in the ordinary course.

Establishing a "culture of compliance"

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Notes:

What is Caremark Standard of Conduct in Practice (cont'd)?

- Level of detail that is adequate for such an information system is a matter of the ***board's business judgment***.
- *No* rationally designed information and reporting system could be expected to remove the possibility that the corporation will violate applicable laws, or that officers and/or directors will be misled or fail to detect compliance problems.
- Courts have shown boards a fair amount of deference over most of the last 25 years

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Notes:

Who is Responsible for Exercising the Caremark Standard of Care?

- Voting members of the board
- Corporate officers and senior executives
- Members of board committees with board-delegated powers

- Not “advisory” and other non-voting board/committee members

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Notes:

Development of Standard of Conduct

Stone v. Ritter, 911 A.2d 362 (Del. 2006)

- Delaware Supreme Court considered a derivative claim arising out of civil settlement related to failure of company employees to rile reports under federal anti-money-laundering laws
- Court established a 2-part duty:
  1. failure to **implement** any compliance system, including information and reporting systems
  2. Conscious failure to **monitor** the operation of the compliance system
- Court still showed deference and dismissed the case

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Notes:

Recent Cases

- In the last few years, the Delaware courts have shown a willingness to allow cases to survive a Motion to Dismiss
- *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019)
- *In re Clovis Oncology, Inc. Derivative Litigation*, No. CV 2017-0222-JRS, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019)
- *Teamsters Local 443 Health Servs. v. Chou*, C.A. No. 2019-0816-SG (Del. Ch. Aug. 24, 2020)

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Notes:

Boeing Case (2021)

- In a case that grew out of the 737 MAX crashes, *Boeing* involved allegations that board failed to establish a reporting system for airplane safety and ignored safety red flags. Plaintiffs alleged that non of the board's committees were responsible with overseeing airplane safety and management did not report to the board on safety issues.
- Court acknowledged that a high bar applied but allowed the case to proceed past the Motion to Dismiss.
- Court noted concerns with respect to both implementation and monitoring
  - Lack of systems in place to report information on "mission-critical" risks
  - Failure to "rigorously" monitor with respect to "mission-critical" risks
- *In re Boeing Co. Derivative Litigation*, 2019-0907 (Dec. Ch. Sept. 7, 2021)

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Notes:

Guidance from Federal Sentencing Guidelines

The board and its compliance committee must:

- Be knowledgeable about content and operation of the compliance program and exercise “reasonable oversight” over its implementation and effectiveness
- Promote an organizational culture that encourages ethical conduct and a commitment to legal compliance

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Notes:

How Should the Duty Be Implemented?

- Good faith as the cornerstone
  - "honesty of purpose"
- Exercise "reasonable oversight"
- Respond appropriately when suspicions are aroused or should be aroused
  - Pause with "yellow flags"
  - Act with "red flags."

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Notes:

Who Cares, Anyway?

1. DOJ (Principles of Federal Prosecution of Business Corporations)
2. OIG (OIG/AHLA compliance whitepaper, CIAs)
3. IRS (Governance Examination Guidelines)
4. State attorney generals (jurisdiction regarding preservation of assets and breach of fiduciary duty)
5. Credit rating agencies
6. “Annoying Third Parties”

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Notes:

Legal Takeaways

- Conduct periodic risk assessments of the business to identify "mission-critical" risks
  - Particularly high-growth companies that expand outside core business
- Conduct periodic compliance effectiveness reviews to ensure that the compliance program
- Board needs to exercising oversight
- Provide appropriate training to board
- Documentation, documentation, documentation
  - Charters, Agendas, Minutes

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Notes:

OIG: The Role of Boards in Compliance

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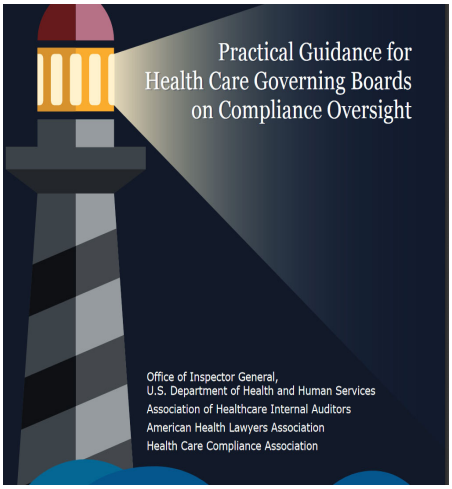
Notes:

AHLA/OIG and HCCA Guidance on Oversight



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Notes:

From The HealthCare Director's Compliance Duties

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Notes:

Other OIG Resources

- ✓ Provider-Specific Guidance
- ✓ CIAs
- ✓ OIG Email Updates

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Notes:

OIG's Perspective: Elements of a Compliance Program

Seven Elements of an Effective Compliance Program

Compliance Risk Assessment Program Annually

Management Certifications

Board Resolution

Compliance Program Effectiveness Assessment

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Notes:

OIG's Perspective: The Compliance Officer

Reporting Structure

- Reports to CEO/Highest Level Officer
- Reports to the Board at least quarterly

Member of Executive Leadership

- Independent & Peer of GC and CFO

Integral Member of CEO's Team

Staff & Other Resources

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Notes:

OIG's Perspective: Board Tools

- Questions, questions, questions
- Board member with compliance expertise
- Executive Session with Compliance Officer
- Independent Compliance Review

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Notes:

OIG's Perspective: Board Tools

Information from Multiple Sources

- Compliance Officer
- General Counsel
- Auditor
- Quality
- Human Resources
- IT
- Security
- Privacy

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Notes:

OIG's Perspective: Lessons Learned From CIAs

- ✓ Hire a Compliance Officer Based on Compliance Expertise
- ✓ Training from Outside Experts (e.g., anti-kickback law)
- ✓ Evaluate Your Compliance Officer
- ✓ Other Lessons

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Notes:

Government Focus on Individual Accountability

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Notes:

DOJ Memorandum on Individual Accountability for Corporate Wrongdoing

September 9, 2015

Largely formalization of prior public statements

Why

- Deters future illegal activity
- Incentivizes changes in corporate behavior
- Ensures that proper parties are held responsible
- Promotes public confidence in judicial system

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Notes:

DOJ Memorandum

Six "key" steps

- How to qualify for cooperation credit
- Criminal and civil focus from onset of investigation
- "Routine" communication between criminal and civil sides
- No release of culpable individuals absent extraordinary circumstances
- Settlement requires plan for individual cases
- Civil focus on individuals beyond ability to pay considerations

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Notes:

From the Headlines…

OIG Excludes Company and Owner from Federal Health Care Programs

Contact:
HHS OIG Media Communications
Media@OIG.HHS.GOV

15-Year Exclusion A Reminder to Industry

Washington, DC - On August 17, 2018, Administrative Law Judge (ALJ) Bill Thomas upheld OIG's 15-year exclusion of Karim Maghareh, Ph.D. and BestCare Laboratory Services, LLC from participation in all Federal health care programs under section 1128(b)(7) of the Social Security Act, the Office of Inspector General (OIG) for the U.S. Department of Health and Human Services (HHS) announced today.

"The decision reached in this case illustrates how OIG will use its administrative exclusion authority to protect the Federal health care programs from untrustworthy individuals and entities who engage in Medicare fraud," said Gregory E. Demske, Chief Counsel to the HHS Inspector General.

Notes:

Compliance Officer Perspective & Practical Tips

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Notes:

Board Basics – Blocking and Tackling

Initial and ongoing education

Compliance program structure

The Seven Elements

Compliance program function

Is the program effective?

How are you benchmarking effectiveness?

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Notes:

Compliance is Dependent on Good Governance

Board Structure

- Do the trustees have the necessary expertise?
- Are outside experts used when appropriate?
- Is there overdependence on management?
- Are meetings "show and tell" or is there substantive discussion on critical issues?

Measuring the Board's effectiveness in their oversight obligations

- Inventory what is mission critical
- How is it monitored?
- Where is it reported?
- If delegated, how is it communicated to the Full Board?

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Notes:

Compliance Partners – Delivering the Message

General Counsel	Human Resources	Information Technology/Data Governance
Finance	Quality and Safety	Strategy Development

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Notes:

Compliance without a Capital "C"

Compliance should exist in the routine activities of the board…doing the right things

- M&A due diligence
- Antitrust
- Use of charitable assets
- Community Health Needs Assessment
- Culture

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Notes:

Tactics to Engage the Board

Know your audience

What is important to them individually?

Do you have an ally?

Work through your Audit and Compliance Committee Chair

Get to know others

Be visible, contribute to the discussion

Compliance is not just the department of "no"

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Notes:

Communication is Key

Work	Include	Leverage
Work with your Board Secretary or Chief of Staff on Setting the agenda • Who is speaking with the board over the course of the year?	Include relevant articles in the meeting pre-reads	Leverage the Work Plan development process • Include trustees in the risk assessment

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Notes:

Pandemic Opportunity

Regulatory Impact

- 1135 Waivers
- CARES Act funding
- Stark Waivers
- Licensing
- State Waivers
- PPE

Compliance with Executive Orders

OSHA

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Notes:

Time for…

Questions

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Notes:

Thank You

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Notes:

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