

## Emerging Issues for the Audit & Compliance Committee

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The agenda of the health system's Audit & Compliance Committee may need to accommodate several important new issues that relate directly to the structure and role of the system's compliance function. They arise from new public policy recommendations on the compliance program; emerging academic discourse on the role of corporate compliance; statements from government regulators; and concerns with the proper balance of compliance program concentration.

None of these issues present mandates or requirements that the Committee is obligated to adopt or implement. Neither do they offer clear "best practices" or suggest problematic conduct that the Committee is advised to implement, or prevent, respectively. Rather, the issues reflect material developments and perspectives affecting legal compliance, and its proper role within the organization, that are worthy of consideration by the attentive Committee. To a large degree, they reflect the evolution of perspectives on the role of compliance programs in complex organizations.

### The ECI Report

For example, the Committee may wish to consider the important new report, *Principles and Practices of High-Quality Ethics & Compliance Programs*, released on April 26 by the Ethics and Compliance Initiative.<sup>[1]</sup> Its authors include a cross section of prominent current and former legislators, government enforcement officials, corporate executives, legal counsel, and compliance officers.

The ECI Report identifies five specific principles and practices that characterize "high quality ethics and compliance programs," or in other words, those that transcend minimum effectiveness standards such as those contained in the Federal Sentencing Guidelines. Indeed, a basic premise of the Report is that the Guidelines are limited as a template for program effectiveness. They establish a framework for the evaluation of compliance programs, but were never intended as a basis from which such programs can be fully and effectively implemented. The ECI Report is, in essence, a call for more comprehensive and sophisticated compliance programs.

The Report is a thoughtful document that is likely to attract significant attention—if not outright adoption by some leading organizations. Comparing the Report's recommendations to the health system's existing compliance program could be a meaningful, good faith exercise by the Committee. This is particularly the case given that the Report encourages organizations to move beyond the Federal Sentencing Guidelines elements—which are, of course, the foundation of many health system compliance programs.

### Governance/Compliance Compatibility

More theoretical, but no less valuable to the Committee's work, are provocative new observations on compliance program utility arising from the academic world. Law review articles rarely constitute "required reading" for board committees. Yet the new piece, *Corporate Governance in an Era of*

*Compliance*<sup>[2]</sup> boldly confronts what are likely to be incipient concerns in many board rooms and executive suites—whether compliance programs ‘have gone too far;’ i.e., whether they are incompatible with traditional models of governance efficiency.

The central theme of the article is that the contemporary compliance program is the product of a de facto government mandate that has become a market-wide concern, particularly in highly regulated industries (like health care). It expresses concern with the difficulty in demonstrating the effectiveness of the compliance program. It describes compliance as *sui generis*; neither arising from nor subsumed by the governance function, but rather supplanting traditional governance modalities.

The article’s fundamental goal is to prompt further conversation amongst scholars, practitioners, prosecutors, and policymakers on the proper calibration of corporate governance and corporate compliance. The Audit and Compliance Committees of sophisticated health systems will want to monitor, and perhaps participate in, that debate.

### **Compliance Program Balance**

Significant regulatory pressures outside of the fraud and abuse area may prompt Committee review of the proper balance of compliance program orientation.

It is totally understandable that a health system compliance program reflects awareness of the most prominent enforcement threats affecting the industry; e.g., the key billing, payment, fraud and abuse, and self-referral rules. However, that awareness should not lead to, nor justify, marginal program emphasis on compliance with other laws enforced by health industry regulators.

The aggressive new health industry enforcement of the antitrust laws underscores the “balance” concern. This enforcement activity extends beyond mergers & acquisitions, to encompass violations of laws relating to price fixing, market allocation, and other similar kinds of activity. <sup>[3]</sup> As a result, legal exposure can arise from conduct traditionally within the realm of corporate operations, and affecting employees and others who may not regularly interact with the compliance department. Those might include management working in such diverse areas as managed care contracting, human resources, physician development, finance/treasury, strategic development, and marketing/communications.

For those reasons, it will be important for the Committee to evaluate whether the current compliance program focus is sufficient to address these emerging antitrust risks, or whether its focus and orientation should be expanded.

### **New HHS Guidance**

The Audit & Compliance Committee will no doubt wish to consider the implications of new Department of Health and Human Services (HHS) Office of Inspector General (OIG) guidance on its “permissive exclusion authority” under Section 1128(b)(7) of the Social Security Act, released on April 18.<sup>[4]</sup> The guidance relates to OIG’s ability to exclude individuals or companies from the federal health care programs for engaging in certain types of prohibited conduct. A primary purpose of the new guidelines is to set forth a “risk spectrum” OIG will apply when considering circumstances in which exclusion may be considered. Of particular interest to the Committee may be the four specific categories to which OIG will refer when making risk assessments as part of an exclusion evaluation. At least two of these factors relate to the substance of compliance program operations, including but not limited to the disciplinary action it has previously taken against problematic conduct, and the organization’s history of self-disclosure to the government.

While the Committee need not be updated with the release of every substantive OIG guidance, rule, or regulation, the permissive exclusion authority guidance is relevant to its agenda to the extent that it (a) contains several compliance program-specific references; (b) helps inform counsel for individuals in structuring their discussions with OIG on the exclusion/corporate integrity agreement issue; and (c) is fundamentally consistent with (but not coordinated with or related to) the Department of Justice's individual accountability focus under Yates; all issues that are likely within the Committee's jurisdiction.

## **Enforcement Voices**

In order for the Audit & Compliance Committee to act on an informed basis, it is helpful to provide members with meaningful public comments of government regulators on key compliance topics.

Falling into the category of "meaningful comments" is a series of recent presentations by senior Department of Justice Criminal Division and HHS OIG officials. These presentations address such key legal compliance issues as individual accountability, indicia of corporate cooperation, and compliance program effectiveness metrics.

A prominent example is the May 10 speech of Deputy Attorney General Sally Yates,<sup>[5]</sup> which provides a director-friendly discussion of the Department of Justice's Policy on Individual Accountability and its approach to giving credit for corporate cooperation. Of particular relevance to Committee members is Ms. Yates' observation on how DOJ's accountability principles appear to be affecting the behavior of corporate employees. Similarly notable were the recent comments of HHS Inspector General Daniel Levinson to the Health Care Compliance Association, explaining the new rules on self-disclosure and noting, famously, that "one doesn't get bonus points for having a compliance program at this point".<sup>[6]</sup>

Easy-to-understand comments of enforcement officials can be an important part of the information flow to the Committee. The decisions on what speeches to share with the Committee can be the byproduct of collaboration between Committee leadership, the general counsel, and the compliance officer.

## **Conclusion**

The Audit & Compliance Committee is a key governance function and its agenda is regularly overflowing. Yet that agenda should be flexible enough to accommodate discussion of emerging issues affecting the health system's compliance program. The most recent of these issues may prompt robust Committee discussion of the breadth and adaptability of the compliance program. The health system general counsel, working in consultation with the chief compliance officer, is well-situated to introduce these issues into the Committee's agenda.

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[1] *Principles and Practices of High-Quality Ethics & Compliance Programs: Report of ECI's Blue Ribbon Panel*, Ethics and Compliance Initiative (2016), available at <http://ethics.org/eci/certification/blue-ribbon/brp-download> (registration required).

[2] Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 Wm. & Mary L. Rev. 2075 (2016).

[3] Bill Baer, Assistant Att'y Gen., U.S. Dept. of Justice, Remarks at the New Health Care Industry Conference (Nov. 23, 2015), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-new-health-care-industry-conference>; Brent Snyder, Deputy Assistant Att'y Gen., U.S. Dept. of Justice, Remarks as Prepared for the Yale School of Management Global Antitrust Enforcement Conference (Feb. 19, 2016), available at <https://www.justice.gov/opa/file/826721/download>.

[4] Criteria for Implementing Section 1128(b)(7) Exclusion Authority, Office of Inspector General of the U.S. Dept. of Health and Hum. Services (Apr. 18, 2016), available at <http://oig.hhs.gov/exclusions/files/1128b7exclusion-criteria.pdf>.

[5] Sally Q. Yates, Deputy Att'y Gen., U.S. Dept. of Justice, Remarks at the New York City Bar Association White Collar Crime Conference (May 10, 2016), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association>.

[6] Daniel R. Levinson, Inspector General, U.S. Dept. of Health & Hum. Services, Keynote Address at the 2016 Health Care Compliance Association Compliance Institute (Apr. 18, 2016), available at <http://oig.hhs.gov/newsroom/video/>.