

Healthcare Compliance

Directors Play a More Active Role In Addressing Regulatory Risk

By Bess Ann Bredemeyer, BSN, RN, CHC, CPC, PCS



Growing regulatory risk and the increased complexity of healthcare are forcing physician leadership to take a much more active role in regulatory compliance efforts.

Gone are the days when directors or trustees could ignore compliance risks and defer solely to management on compliance-related topics. Instead, boards must understand the risks facing their organization, oversee the development of programs designed to mitigate those risks and monitor the effectiveness of the programs over time. Failure in any of these areas can leave both the practice and directors vulnerable to penalties and sanctions.

Smaller Groups at Risk

From the largest public company to the smallest not-for-profit physician group, no provider organization is immune from scrutiny in today's regulatory environment. In fact, the smallest groups – those in which practicing physicians also serve as board members – arguably face greater regulatory risk than their larger counterparts, as evidenced by the increasing number of enforcement actions taken against small group practices in recent years. The heightened danger reflects the dual role that physicians play, along with the organizations' limited compliance resources and expertise.

The good news for practices that take a more aggressive approach to compliance is two-fold: First, the possibility of regulatory problems and attendant expense is greatly reduced. Second, enhanced compliance should help improve coding and billing and thus increase cash flow.

Climate Change

Regulatory enforcement activities in healthcare have been increasing since the late 1980s. The growth of healthcare spending by government agencies, particularly Medicare and Medicaid, has been matched by an evermore aggressive stance taken by federal and state regulatory and law enforcement agencies.

High-profile enforcement cases, ranging from Hospital Corporation of America and HealthSouth Corp. to, most recently, fraud allegations involving St. Barnabas Health Care System, New Jersey's largest healthcare provider, have dramatically underscored the consequences of non-compliance.

Separately, the Sarbanes-Oxley Act of 2002 has created new standards for board responsibility and oversight. The act was developed in response to a series of corporate and accounting scandals that rocked American business around the turn of the century.

Although Sarbanes-Oxley applies solely to publicly traded companies and focuses primarily on financial and accounting controls, the legislation's fallout has been broad. A significant number of non-profits have adopted some provisions of Sarbanes-Oxley in order to further strengthen internal controls and board oversight.

Enlightened self-interest on the part of directors also has fueled greater board involvement in compliance issues. The possibility of personal civil damages, criminal charges, tax liability and harm to reputation stemming from organizational non-compliance has compelled board members to sharpen their focus when it comes to regulatory matters.

Direction and Oversight

What exactly are the board's compliance duties? What role should a board of directors play? Boards have a responsibility to be knowledgeable about the content and operation of the compliance program and exercise reasonable oversight. That includes the risk identification process, compliance plan development and implementation, and ongoing involvement to verify the effectiveness of the plan.

Although ownership of risk recognition, prioritization, plan development and implementation remains with management, the board must provide an active sounding board throughout the process.



In simplest terms, board members must make a good-faith effort to ensure that the information they're receiving from management is accurate and comprehensive and that they themselves understand what it means. Put another way, board members should question management about potential risks and plans for addressing those risks.

A reasonable approach for board members is to assume that their individual or collective actions, deeds, words and recommendations may well be subject to regulatory scrutiny in the future. A good faith effort to stay reasonably informed about specific compliance issues is therefore critical. This point may seem self-evident, but the inherent complexity of healthcare and the intricacy of regulations often can seem overwhelming to some directors, particularly those without a background in the industry.

Identification and Assessment of Risk

The Department of Health and Human Services' Office of Inspector General (OIG) Model Guidance provides parameters for an effective compliance plan through three primary documents: Guidance for Small

Groups and Physicians, 3rd Party Billing Guidance, and the Hospital Guidance (which provides universal guidance for effective compliance programs). It is also necessary for boards to be knowledgeable about both past and future enforcement activities. They should monitor enforcement actions and pay close attention to the OIG's future compliance expectations.

To that end, the OIG publishes a document each year that provides a detailed roadmap of areas where the OIG will focus its enforcement efforts in the coming fiscal year. Called the Work Plan, the document is organized by type of healthcare service and offers a wealth of information about the kinds of regulatory scrutiny providers can expect. A thorough understanding the OIG's past and present enforcement agendas can greatly simplify the task of risk prioritization to ensure the compliance program is properly managed.

In a perfect world of unlimited resources, all potential regulatory threats would be addressed with equal vigor. Unfortunately, the limited dollars available for compliance, particularly at small practices, means initiatives must be focused on the areas of greatest



risk. Board members therefore should work closely with management to identify areas of vulnerability based on the group's specialty.

It is important to note that responsibility for risk identification belongs to management. However, board members should be trained by the compliance plan administrator to understand how the organization both identifies and addresses risk. It is only through this understanding that a board member is able to provide effective guidance and oversight of the compliance plan. Subsequently enabling effective oversight protects not only the organization but also the individual board member from criminal and personal liability.

Compliance Plan Development and Implementation

Once risks are identified, the development of an effective compliance plan can proceed. As indicated in the OIG's Compliance Program Guidance publications, primary plan components include:

- Designation of a compliance leader
- Creation of policies and procedures in business areas subject to regulatory authority
- Development of training and education programs
- Developing open lines of communication
- Creation of monitoring and auditing mechanisms
- Creation of enforcement and discipline mechanisms
- Creation of mitigation and prevention mechanisms

It's worth repeating that while it is management's responsibility to drive effective plan implementation, board members have a duty to monitor and oversee the process. By assisting in the development of the compliance plan, board members are in a better position to provide effective oversight going forward.

Weighing the Costs

It is not unusual for organizations to seek outside assistance when creating a compliance plan, since the complexity of the task requires expertise that many small and medium-sized practices simply do not have. Although the costs associated with plan development can seem substantial, boards should resist the temptation to scale back or shelve the effort. Compliance costs typically level off once the program is established. And when compared to the expense of defending an enforcement allegation or the consequences of an enforcement decision – fines, penalties and the potential loss of Medicare eligibility, for example – plan development costs are miniscule.

Moreover, the capabilities that a qualified consultant can deliver, in expertise, prior experience and access to required resources, will reduce the time required to develop a plan.

Oversight and Upstream Communication

For board members, sound oversight depends on having access to all relevant information, including input from employees about specific regulatory concerns.

The compliance plan therefore must include mechanisms for upstream

communication that culminate in a process in which the board is regularly informed about risks and concerns. Key questions that must be answered include:

- How is information reported to management and the board?
- How frequently will the board receive reports and how detailed will they be?

An executive team may withhold information about problems or investigations from the board with the expectation that the issue can be resolved quickly, quietly and internally. It is therefore incumbent upon directors to regularly ask about any ongoing compliance activities, investigations or audit results.

It should be noted that self-disclosure to payors or regulators about regulatory problems inevitably will likely serve the organization better than downplaying or ignoring the issue. In fact, if regulators later determine that board or management knowledge of the problem pre-dated regulators becoming aware of the issue, the consequences can be severe.

Along the same lines, regulators take a dim view of compliance programs that are created but not implemented, or implemented but not followed. In those instances, they typically will hold organizations to the letter of the plan, regardless of the extent to which the plan has been followed.

Ultimately, good compliance comes down to a willingness and desire to do the right thing.

Disclosure Considerations

When an issue of non-compliance arises, there are several options and opinions to consider regarding remediation and the appropriate degree of disclosure to relevant parties. Admittedly, there may be instances when board members are reluctant to take the full-disclosure approach or are not convinced about its necessity. When a consensus can't be reached, it is important for individuals to get out front and on the record with their concerns while making the case for compliance and disclosure early and

often. It may also be worthwhile to retain a competent and experienced healthcare attorney that can explain the risks of non-disclosure or failing to act.

Business Planning

Beyond reducing the likelihood of an enforcement action, a strong compliance plan can also be useful in business planning. Organizations that consider compliance when exploring business expansion will be in a much better position to answer the central question: "How are we going to bill for this service?" Because restrictions exist for reimbursement of certain services, it is vital that organizations understand the payment picture before committing significant capital and time to the new service opportunity.

A Working Partnership

The complexity and high stakes of healthcare today require board members to become much more involved in providing guidance to healthcare organizations. In the areas of risk identification and plan development, directors and management should work as partners to ensure that the organization's regulatory defenses are as strong as possible. When it comes to oversight, boards have a special responsibility to ask difficult questions and to probe for weaknesses in the program. The goal is not to antagonize managers, but to provide additional support and depth to the overall compliance effort.

Ensuring Success

A compliance initiative can only succeed if it is fully "operationalized" throughout the organization. Too often, the level of expertise and volume of ongoing resources required to effectively develop, implement and sustain a compliance plan is not available in organizations primarily focused on providing safe and effective patient care.

A third-party assessment is a powerful tool to help ensure the program's effectiveness and to reduce personal liability for board members, who are primarily charged with oversight.

It may be worthwhile to consider retaining a qualified expert at the outset of the compliance process to ensure that resources, time and effort are harnessed to the greatest effect. A competent and experienced consultant can help expedite plan development, assist with implementation and provide guidance on ongoing oversight and supervision. ■

This article is the second in a series of three articles by Bredemeyer on compliance and physician practices.

About the author:

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