



Integrated Healthcare Strategies  
ARTHUR J. GALLAGHER & CO.

# ARE BOARDS PAYING ENOUGH ATTENTION TO COMPLIANCE?

THE WARNING SIGNS OF RISK AND HOW TO PREPARE TO HANDLE THEM

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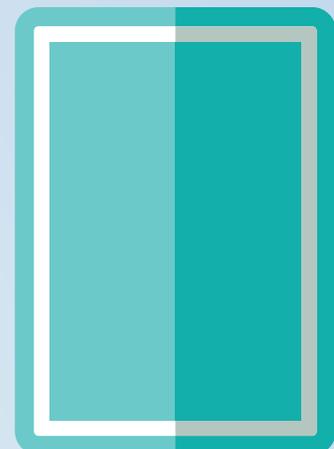
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# INCREASED RISK

## Increased Responsibility

Boards have a duty to see that hospitals and health systems comply with all state and federal laws and regulations, but they generally delegate responsibility for establishing, managing, and monitoring compliance programs to management. They also have a fiduciary responsibility to see that charitable assets are used appropriately.

The size and number of penalties imposed on healthcare organizations over the past few years suggest that they are not paying enough attention to the risks their organizations are embarking on as they venture into accountable care and population health management; employ more physicians and acquire medical practices; merge with or acquire other organizations; engage in transactions that directly benefit trustees; or race to the top of the market in executive compensation. The penalties imposed on healthcare organizations have totaled \$2 billion a year for the past five years.



Healthcare Organization  
Penalties Have Totaled  
**\$2 BILLION**  
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## REGULATIONS ARE GETTING TIGHTER

The cases behind these settlements represent only the beginning of an effort by regulators to guard against improper use of public funds. Most of them were identified by whistleblowers, who alerted the authorities of the problem. Anyone who works enough with healthcare organizations knows that there are many other arrangements that would be hard to defend, just waiting to be reported.

With more than a quarter of the federal budget dedicated to healthcare, and with states struggling to fund their healthcare budgets, it is no wonder regulators are paying so much attention to the way healthcare organizations spend their funds. The increased regulatory focus on healthcare organizations was acknowledged at the recent ACO Summit by representatives of the Office of the Inspector General (OIG) and attorneys close to recent Federal Trade Commission actions to resist consolidations deemed anti-competitive.



Percentage of federal budget  
dedicated to healthcare—  
thus increasing scrutiny

Two recent publications underscore the board's duty to assure compliance with state and federal laws and regulations. The OIG<sup>1</sup> advises boards to ask the right questions and get regular reports to keep informed about compliance risks and the effectiveness of compliance efforts. The Yates memorandum<sup>2</sup> raises the stakes for trustees by directing DOJ investigators and prosecutors to pursue individual accountability, rather than just focus on institutional accountability.

## 3 WAYS BOARDS CAN LOWER RISK

And limit their exposure to liability for non-compliance

### DOCUMENT

Decisions should be carefully documented to **demonstrate trustees' diligence** in exercising the duty of care.

### PROVIDE PROOF

Documentation should demonstrate that decisions were based on objective consideration of **facts**.

### BE PROACTIVE

Communication via email should **avoid any suggestion** of inappropriate motives for decisions.

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

2 <https://www.justice.gov/dag/file/769036/download>



## TRUSTEES ARE MORE EXPOSED

Trustees can no longer count on being held blameless, unless they exercise a reasonable degree of diligence and keep adequate records to prove it. Boards should be sure to monitor compliance efforts and keep adequate records documenting their diligence.

Trustees are directly exposed to compliance risks as they evaluate and approve major corporate transactions, such as mergers and acquisitions and sales of major assets, and as they venture into accountable care and population health management, whether deciding how to share savings with independent physicians, offering risk-based contracts directly to self-insured employers, or offering insurance products on the exchanges. But they are more frequently exposed to compliance risks every time they approve contracts with or compensation for physicians or executives.

Trustees can no longer count  
on being held blameless.

## COMPENSATION RISKS ARE OVERLOOKED

The risks associated with these arrangements rarely get much attention from the board as a whole.

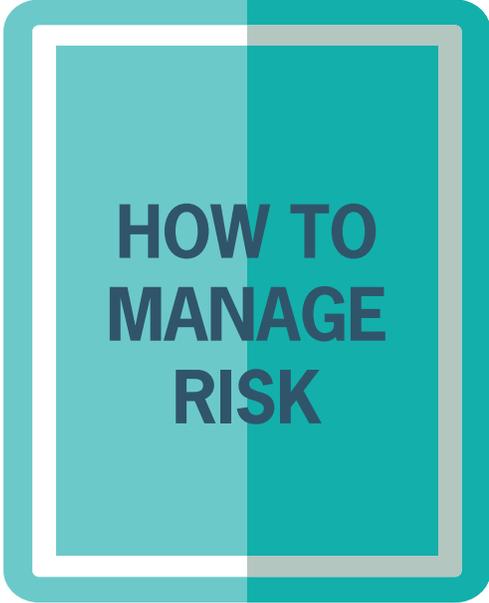
Physician compensation and other arrangements with physicians pose some of the greatest risks of non-compliance. Yet we sense, as we work with clients, that these risks are too often ignored by boards. The recent string of huge settlements for violations of rules on physician compensation suggest that boards have not been asking the right questions or doing enough to assure compliance related to physician compensation.

Executive compensation poses risks, too, of violating tax laws, engaging in excess benefit transactions, and misreporting compensation on Form 990. It also gives local tax authorities one more way to challenge tax exemption. The penalties for non-compliance may be less than with physician compensation, but any penalty is compounded by bad publicity and the concomitant alienation of staff and physicians. We sense that these risks are generally ignored by boards, too.

Most boards charge a committee with overseeing executive compensation and expect it to see that compliance risks are managed well. Some, but not nearly all, charge a committee with overseeing physician compensation and expect it to see that management handles the compliance risks well.

Trustees should be able to expect committees, with the support of staff, to handle much of the board's responsibility for seeing that physician and executive compensation comply with regulation. But trustees who do not serve on these committees should also expect the committees to keep them informed about the risks and tell the board how the risks are being managed.

We often see committees doing a reasonably good job overseeing physician and executive compensation, but we know that the risks associated with these arrangements rarely get much attention from the board as a whole, so the board is too often left in the dark about the compliance risks.



## HOW TO MANAGE RISK

There is a good and easy way to keep the board aware of the compliance risks associated with physician and executive compensation. There is a good and easy way of telling them how well the risks are being managed. And it isn't expecting the committee chair to provide a report.

The best way is to ask the independent consultant who works for the committee to present a brief report to the board as a whole—either once a year or every two to three years. It is far easier for a consultant than the committee chair to explain the risks, evaluate the level of risks, and assure the board that the committee is doing a good job.

The board needs to keep informed about these risks and it needs to get assurance that they are being handled well, or it may find itself in settlement talks with the OIG and DOJ.

But the board's oversight of compliance needs to extend beyond compensation to risks related to coding and billing, whistleblower response, physician joint ventures, and reporting and disclosure, among others. The reality is that boards need to be more diligent about overseeing all of their organization's compliance efforts to safeguard their organization's reputation and assets.

Boards should start by recognizing that regulatory enforcement has increased, that too many risks are being ignored, and that trustees are now more exposed to liability for corporate misdeeds. Then they should take steps to strengthen oversight of compliance efforts to protect themselves and their organization.

# STEPS BOARDS CAN TAKE

## 1 Form a Committee for Physician Compensation

Charge a committee with overseeing physician compensation, developing policies on physician compensation for board approval, establishing a process for assuring compliance, getting regular reports on any compensation arrangement that entails any significant risk, and periodically getting a thorough evaluation of physician compensation from an independent consultant.

## 2 Form a Committee for Executive Compensation

Charge a committee with overseeing executive compensation, developing policies on executive compensation for board approval, seeing that executive compensation complies with those policies, following the process for avoiding intermediate sanctions, and using an independent consultant to assist the committee.

## 3 Request Reports at Least Once a Year

Charge the committees with keeping the board informed about the risks and giving it reports at least once a year that highlight any risks associated with physician or executive compensation and explaining the plans and efforts to reduce the risk.

## 4 Use an Independent Consultant for Reports

Expect the committee to use an independent consultant to prepare and present its report to the board, so that the board can delve into the compliance risks and issues as far as it wants to go to satisfy itself that the risks are being handled well by staff, and to satisfy itself that the committee is being sufficiently diligent.

## Prepare Your Board Now!

Contact Gallagher Integrated for the insight you need to stay informed and protect your board from compensation risk.

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