

## RISK ASSESSMENTS, AUDITS AND FLORIDA SWAMP LAND

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This is the second in a series of articles on what the Office of Inspector General (OIG)'s Compliance Program Guidance for Hospitals does - and does not - require of hospitals and hospital-based systems. The goal is to bring implementation and maintenance of an effective compliance program within the reach of every hospital and system.

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In the first article of this series (*The Pastin Report*, July 1998), we looked at the relationship between the compliance *plan* and the compliance *program*. We emphasized that the plan need not and should not be a lawyered, intricate recitation of every law, regulation and associated loophole. The plan should be exactly what it says it is - a step-by-step plan detailing how your hospital or system will build and/or maintain its compliance program.

The first step in most plans is the **compliance risk assessment** (compliance audit, legal review). The compliance risk assessment is encouraged not only by healthcare regulation, but by the Sentencing Guidelines for Organizational Crime. The concept is simple: If your compliance program is to have a reasonable prospect of being judged effective - and exculpatory, it should address the main compliance risks to which your hospital or system is exposed.

More hospital and system funds are squandered on misunderstanding of the risk assessment than on any other compliance program element. It is reprehensible and discouraging that many CPAs, consultants and lawyers try to turn the risk assessment into a "work fare" program - at your expense. To avoid expensive traps, it is important to understand what the compliance risk assessment is and is not.

### **1. What the Compliance Risk Assessment Is and Is Not.**

In simple terms, the compliance risk assessment is a **forward looking assessment** intended to enable a hospital or system to focus its compliance program on the risks it is most likely to face given its activities. For example, if your hospital does not operate a home health agency, training employees to understand the criteria for home bound status is not the best use of your resources. If you have a large

clinical laboratory operation, it would be foolish to overlook such issues as defining medical necessity with respect to tests ordered, getting appropriate original signatures on requisitions, and ensuring you bill only for tests actually performed.

There are two categories of risk to consider in your assessment - **general risks** - risks that apply to any hospital or system that operates as yours does (e.g., as a non-profit acute hospital or as a shareholder-owned multi-state system) and **risks specific to the government programs** in which your hospital participates.

General risk areas include:

- Anti-trust (competing fairly; avoiding price fixing)
- Conflict of interests (board, employee, medical staff)
- Proprietary and inside information (even non-profits have vulnerability)
- Fair employment practices
- Inurement (non-profits)
- “Linked” contributions (logged as charitable but tied to a business opportunity)
- Proper use of corporate assets
- Environmental issues including proper disposal of medical waste
- Work place health and safety
- Bribes and kickbacks
- Purchasing practices

While this is not a complete list of general risks, it is a good check list with which to start. Specifically, if you do not have policies in the above areas applicable to your hospital or system, you should develop them. And if you see special risk in a given area, cover that area in your code and training as well as in your policies.

The OIG - in an apparent effort to defuse the vendor frenzy surrounding compliance risk assessments - has outlined the **risks likely to arise in conjunction with government programs**. The OIG's list is simple and provides a sound basis for the areas of your assessment that go beyond general risks:

- Billing for items and services not actually rendered
- Providing medically unnecessary services
- Upcoding
- DRG creep
- Outpatient services rendered in connection with inpatient stays
- Teaching physician and resident requirements for teaching hospitals
- Duplicate billing
- False cost reports
- Unbundling
- Billing for discharge in lieu of transfer
- Patients' freedom of choice
- Credit balances - failure to refund
- Hospital incentives that violate the anti-kickback statute or other similar federal or state statute or regulation
- Joint ventures
- Financial arrangements between hospitals and hospital-based physicians
- Stark physician self-referral law
- Knowing failure to provide covered services or necessary care to members of a health maintenance organization
- Patient dumping.

While there is nothing new on this list, it is a long list that provokes the question: How can we cover all of this? If you are the Compliance Officer, the question may be: How can *I* cover all of this?

One thought is to hand the task to outside auditors. Besides being an exquisitely expensive approach, it probably will not yield a compliance risk assessment. It probably will yield numerous issues

potentially requiring your hospital or system to make disclosures to payors and/or enforcement authorities.

The problem with the outside audit approach is that it is driven by review of documents relating to **past practices**. But the compliance risk assessment and the compliance program must be forward looking. Even if you audit every bill and record for the past five years, you may have little idea what your *going-forward risks* are. With the rapid pace of change in plans and regulations, you will surely miss a lot. And, unless you are the hospital or system that I have not yet met, a competent review of past billing practices will uncover issues and problems.

The likely outcome is that you will have documentary evidence of improper actions that may or may not be continuing practices. The only correct way to deal with this evidence is to evaluate the need to make disclosures to payors and enforcement officials. This will consume considerable time and resources and advance your compliance program not one wit.

To be sure, we are not saying that you are better off not knowing what you may have done wrong in the past. But you are better off not confusing a the on-going **internal** process of reviewing and correcting past practices with the different task of launching your compliance program.

The risk of facing a huge book of potential disclosures has convinced some hospitals to hand the risk assessment to a law firm. And some law firms have either marketed their services in conducting the risk assessment that they can somehow reduce the risk that you will have to make disclosures. The supposed magic elixir is spreading privilege over the risk assessment - and, some would pretend, the entire compliance program.

In fact, it is a sure sign that you are dealing with the wrong law firm if the firm represents that they can privilege the entire risk assessment or compliance program. Legal privilege is not mayonnaise and the attempt to spread it too broadly is more likely to compromise privilege than to cloak your entire risk assessment in protective garb. In simple terms, privilege is best defined and most likely to be defensible if a lawyer or law firm is acting on your behalf and/or creating work product **related to an**

**actual or anticipatable litigation.** While there are days on which you may feel that your entire compliance program is a litigation matter, no enforcement agency or court is likely to agree with you.

Both audit firms and law firms may have important roles in risk assessments, but these roles are less grandiose than they imagine. If your risk assessment uncovers an area that causes you concern, you may wish to commission a **focused audit** with respect to that area. In many cases, you may be able to conduct the audit using your own internal resources. If you do not have resources or anticipate a disclosure, consider using a recognized outside firm.

If your concerns are fairly specific or if you think there is a reasonable prospect that you will have to make disclosures, confer either with in-house or outside legal counsel **before** initiating the audit or investigative process. If your concerns are specific, you have a good chance of privileging the review if overseen by properly appointed counsel. Even in this case, you may wish to use internal resources directed by legal counsel to conduct the audit or investigation. There is no requirement that lawyers perform these tasks to preserve the privilege.

(Since the issue of where legal privilege may and may not prove protective in the development and operation of a compliance program, the next issue of *The Pastin Report* will carry a detailed analysis of this issue.)

## **2. What To Do**

Like most elements of compliance programs, the more you put into the process the better the outcome. This is particularly true of the compliance risk assessment where the compliance officer needs to thoroughly understand the risks that her/his program will have to address once it is fully operational.

Before beginning, meet with your compliance committee or an hoc committee charged with overseeing the compliance program to review the scope and method of the risk assessment. While the compliance officer will have to oversee and carry out many aspects of the assessment, members of the compliance oversight group can actively assist in many tasks.

The first topic to address is the scope of the assessment and areas that need attention. You may wish to use the above lists and other resources to present the group with a set of prospective topics. Proceed with a bias towards being inclusive rather than narrow in the assessment. For example, even though fear of retribution (for reporting potentially improper acts) and other human resources issues have a limited role in the above risk lists, fear of retribution is the factor most likely to create whistle blowers in the form of qui tam plaintiffs.

Once you agree on a list of risk areas, identify teams to assist with the risk assessment. Team membership should be determined by area of competence, but not by the desire of team members to control the assessment with respect to their own areas of responsibility. If there are areas on which no one feels competent to assess the risks, you may want to call in outside help in these areas. For example, if there is no one in your group who understands cost reporting issues in a post-acute environment, you may seek a briefing on this topic by an expert.

Once the risk areas and teams have been set, you need to determine your methodology. You will be surprised how much you can learn by simply interviewing people individually or in groups. Healthcare employees tend to be communicators and definitely want to understand any risks to which they and their function are exposed. It is important to tell people why you are meeting with them and to ensure the confidentiality within reasonable limits of what is said in the risk assessment sessions.

Some of the things you need to question with respect to each risk area include:

- Presence/absence of a policy giving adequate guidance in the area
- Has the policy been recently updated; does the update accurately reflect the requirements; has the policy been communicated to and understood by employees
- Are there incentive or operational reasons for violating the policy
- Would employees know how and be willing to report a violation
- Are systems/operations designed to encourage compliance with the policy
- Have employees recently/regularly received training in this area
- Is the training periodic, documented and part of audits
- Do employees or others have recommendations for improving compliance in this area

These are a few of the questions we use when conducting a risk assessment. Given your operations and the membership of your team, develop a protocol that fits your organization. To the extent practical, stick to the protocol in each session and consistently across teams.

We find it useful to summarize results of the risk assessment for the compliance team and executive management in the form of a grid. This format avoids gratuitous retention of unsupported allegations and accusations, while helping your team and executive management focus on the issues of most importance. An example of how we organize the results of the risk assessment in grid form is included in this issue's *Compliance Officer's Toolbox*.

You can learn a great deal about your own hospital or system and about the best way to implement and operate your compliance program by undertaking the compliance risk assessment relying primarily on your own resources. Instead of ending up with a barely comprehensible document that may or may not fit your operations, you have started the process of bringing your compliance program to life. While the compliance risk assessment is ordinarily viewed as part of the process of launching the compliance program, it must also become an on-going activity in any program that wishes to remain applicable and effective. One product of the risk assessment should be a schedule for on-going assessment activities.

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