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CORPORATE COMPLIANCE UPDATE: THE IMPACT OF PROPOSED CHANGES TO FEDERAL ORGANIZATIONAL SENTENCING GUIDELINES ON HOSPICE COMPLIANCE PROGRAMS

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The U.S. Organizational Sentencing Guidelines provide a definition of what constitutes an "effective program to prevent and detect violations of the law." The Sentencing Guidelines ("Guidelines") are used in determining the sentence of organizations convicted of federal crimes and the Department of Health and Human Services Office of the Inspector General ("OIG") has relied upon the Guidelines to define the necessary elements of an effective compliance plan for health care providers, including hospices.

A compliance plan is a health care provider's strategy to establish a culture within the organization that promotes prevention, detection and resolution of instances of conduct that do not conform to federal and state law, especially in the areas of fraud and abuse; federal, state and private payor health care program requirements; and the organization's ethical and business policies. The seven elements of an effective compliance plan, as defined by the Guidelines, are:

1. Written standards of conduct and written policies and procedures.
Development of a compliance team.
2. Education and training.
3. Effective lines of communication.
4. Disciplinary policies that reflect compliance concerns.
5. Audit and monitoring procedures.

6. Investigation and correction of systemic problems.

In October of 2003, the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines issued a report making significant recommended changes to the Sentencing Guidelines (the "Report"). These proposed changes, while they do not yet have the force of law, will likely be adopted in some form and therefore impact on what every hospice should be considering when implementing an effective compliance plan.

In developing the proposed changes to the Guidelines, the Ad Hoc Advisory Group was greatly impacted by the recent wave of scandals and governmental attempts to address these scandals. While it may appear that Enron, WorldCom and other situations that have dramatically impacted the U.S. economy have little to do with hospice, the public revelation that the directors of these sophisticated organizations were either deliberately overlooking or unaware of the scope and extent of the illegal conduct of their organizations serves as a wake-up call to every corporate board. Recent events and legislative responses will likely also influence the OIG's oversight of health care providers' corporate compliance programs.

Remembering that the purpose of the Guidelines is to create a model for the good "corporate citizen," in light of recent scandals and legislative/regulatory responses we can expect that there will be more focus on empowering compliance officers, encouraging reporting up the chain of command in the case of any potential compliance problems, conducting adequate training, testing effectiveness of and compliance efforts and ensuring accountability for compliance failures that have been identified. The Ad Hoc Committee objectives in proposing changes to the Guidelines were as follows:

- Describe more fully those attributes of successful compliance programs,
- Respond to the lessons learned from national corporate scandals over the past two years, and
- Synchronize the Sentencing Guidelines with new federal legislation and emerging public and private regulatory requirements.

The Ad Hoc Advisory Group recommended that the scope of compliance programs be expanded to prevent and detect violations of any law, whether criminal or non-criminal, for which the organization is or would be liable. Previously, the Guidelines targeted only criminal violations.

The Report sets forth six major areas of proposed changes:

1. Culture and responsibility of organizational leadership.
2. Effective communication of standards and training.
3. Monitoring, auditing and evaluation.
4. Reporting systems.
5. Accountability and remediation.
6. Risk assessment.

1. Culture and responsibility of organizational leadership.

The proposed change to the Guidelines would require that the organization actively promote a culture of compliance with all laws, that leadership be knowledgeable about the content and operation of the compliance program, and that directors of the board be knowledgeable about the content and operation of the compliance program and exercise reasonable oversight with respect to implementation and the effectiveness of the program. Under this proposed change, the compliance officer be given adequate resources with which to implement and operate the compliance program and periodically, directly report to the board of directors or a committee of the board of directors. The board would also be required to hear directly from any other person(s) having day-to-day responsibility for implementation and operation of the organization's compliance program.

2. Effective communication of standards and training.

Another proposed change is to require organizations to provide effective training that would educate and motivate employees to comply with their compliance plan. Monitoring would not be optional, it would be required; and the required audit would cover areas of risk in terms of the sufficiency of managerial practices. The audit must scrutinize adherence to program requirements and include

periodic regular evaluation of the effectiveness of the compliance program.

3. Reporting systems.

The proposed change would require implementation and publication of reporting mechanisms that encourage reporting of violations without fear of retaliation. An anonymous reporting mechanism would be required and the issue of confidentiality for those reporting potential violations would need to be considered.

4. Accountability and remediation.

The proposed change would require organizations to take action and respond to detected violations. Such response would need to include appropriate disciplinary actions, steps to prevent similar future violations and implementation of appropriate modifications to the compliance program in order to improve detection and prevention.

5. Risk assessment.

The proposed change would require organizations to tailor their compliance program to its business circumstances, to determine the scope and nature of risks on an ongoing basis and to use the results of risk assessments to influence the design and implementation of its ongoing compliance program to ensure its effectiveness.

It is important to bear in mind that the Report sets forth recommendations for change. However, proactive hospices will want to ask certain questions regarding their existing compliance plan and ensure that their boards of directors and management are keenly aware of the government's current views of compliance and concerns regarding the role of leadership within the organization. Following are questions that should be asked:

1. Culture and responsibility of organizational leadership.

- Is compliance identified as a priority by top management?

- Are employees aware of the compliance program and the responsibility for compliance?
- Are board members familiar with the compliance program and its implementation and effectiveness?
- Does the compliance officer enjoy a high level of authority within the hospice?
- Does the compliance officer have access to senior management?
- Does the compliance officer directly report to the board of directors or a board committee?
- How often does the compliance officer report to the board regarding implementation and effectiveness of compliance efforts?
- Are the resources dedicated to compliance efforts commensurate with the size and complexity of the hospice?

2. Effective communication of standards and training.

- Has training been done on the compliance program annually? Has it been updated?
- Assess the type of training conducted based on the size and culture of your hospice.
- Is there documentation to show that every employee has been trained? Including board members?
- Is there specific training on risk areas pertinent to your hospice?
- Has your training been effective?

3. Monitoring, auditing and evaluation.

- Does your hospice have a written monitoring plan?
- Does your hospice need or has it had an independent review of your program?
- Does your hospice have written corrective action plans?
- What are your effectiveness measures?
- Is senior management made aware of findings?

4. Reporting systems.

- Are whistleblower protections documented and publicized?
- Are employees aware of how to report compliance violations?
- Does the organizational culture within your hospice encourage reporting and support persons making reports?
- Is there an anonymous mechanism to report violations?

5. Accountability and remediation.

- Are compliance violations dealt with consistently? Are individuals held accountable? Are disciplinary actions taken at all levels?
- Do you have a policy and procedure in place to address handling of violations? What is the involvement of senior management and the board in the process?
- Does the procedure include evaluation and modification of the compliance plan? Are remedial efforts documented?

6. Risk assessment.

- How do you evaluate potential areas of risk?
- Who is involved, is the evaluation documented? How do you monitor changes in laws and regulations?
- Have your policies and procedures been reviewed and updated to reflect these changes.

In summary, the hospice's corporate compliance plan should be a living, breathing document that is embraced by the entire organization, including the board of directors. The CEO or administrator of the hospice has a primary obligation to ensure that the compliance program is understood and adhered to at all levels within the organization and to ensure the compliance officer has sufficient resources and access to leadership to carry out the compliance plan. While the Report is still a recommendation, it provides important

guidance to hospices in addressing those compliance issues that are unique to the hospice industry and unique to the individual hospice organization.

Hospices are encouraged to update their board members regarding these proposed changes. Hospice compliance officers should revisit the OIG Program Guidance for Hospices and to apply the selected risk areas to their individual circumstances. If your hospice is interested in additional board or employee compliance training, please contact the author.

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