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Embrace the Crystal Ball, Improve Post-Transaction Compliance Program Effectiveness

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Alexander the Man Who Knows[1] (no relation to the author of this article) was a famous magician specializing in public acts of mentalism and psychic readings. Attendees at his shows would submit their questions in sealed envelopes and like many fortune tellers, he often gazed into a crystal ball before providing his pronouncements. My experience supporting compliance due diligence associated with healthcare transactions, whether hospitals, home health agencies, behavioral health, or specialty medical practice deals, and irrespective of buyer type (private equity, corporate for-profit, not-for-profit), often has more in common with vaudeville era fortune telling than not.

Due diligence in healthcare transactions is essential for mitigating risks, identifying potential regulatory compliance gaps, understanding the financial and operational aspects of the target, as well as planning for a successful post-transaction integration. Although often referred to as an "industry," the variability between healthcare provider and supplier types across the care continuum, combined with the influence of regional, state, and local market variations suggests healthcare may be more aptly described as a collection of cottage industries. Variability by specialty and market, combined with typical deal dynamics in which the buy-side desires more data, documents, and assurances than the sell-side is willing to give, is particularly pertinent when the target organization's Medicare and Medicaid reimbursement represents the largest piece of their revenue pie.

Formed from glass or quartz, crystal balls provide an omnidirectional, albeit somewhat distorted view of distant objects slightly beyond the surface of the sphere on the opposite side from the viewer. The resources (time/treasure) on either side of a healthcare transaction are never unlimited, and the buy-side level of risk tolerance

informs the depth and breadth of diligence necessary to make that go-no-go decision. Furthermore, the predictions of the buyer's potential future liabilities for the target organization's past provided by compliance and revenue integrity experts like me may be based on an audit of a probe level of claims, heavily redacted or limited data reports, and/or a paucity of formal policy and procedure documentation. Assuming some known or unknowable retrospective overpayment liability or some other gap in regulatory compliance is perennially part of the price of admission when acquiring or merging with another healthcare organization, it should not be surprising that go-no-go observations are often light on guarantees and resemble an informed but heavily caveated fortune. However, even heavily caveated predictions, when accompanied by specific, actionable, scalable, and opportunity-centric day-one compliance program recommendations from compliance diligence partners can serve to place risks in proper context and provide acquirers with a plan to predict their own fortune post-go decision.

While every transaction presents novel combinations of compliance risks and opportunities, the guidance found in Section F, Mergers and Acquisitions, of the U.S. Department of Justice Criminal Division Evaluation of Corporate Compliance Programs[2] eliminates the weakness of the crystal ball approach altogether by clearly connecting the effectiveness of pre-transaction diligence activities by the acquirer with the post-acquisition implementation approach. High-level action plan items I recommend for applying the spirit of the DOJ evaluative criteria to a comprehensive day-one approach for real-time healthcare compliance program effectiveness activities post-transaction typically include, but are not limited to:

- Developing a process and accountabilities for tracking and remediating misconduct or misconduct risks identified during the due diligence process.
- Remediating gaps and implementing compliance policies and procedures for the new or combined organizations.
- Revising staff compliance training materials and conducting off-cycle compliance training as necessary to socialize revised/new policies, procedures, and any changes to compliance leadership and processes for reporting issues.
- Integrating post-transaction audits of newly acquired entity services into existing organization compliance work plan as soon as practical. Focus areas to include monitoring specific high-risk areas identified during diligence.
- Prioritize conducting a special compliance update and training session focused on revised compliance risk landscape for the organization's board and executive team.
- Performing an updated compliance risk assessment for the combined organization within the first 90 days post-transaction. Focus areas to include as applicable HIPAA Privacy and Security, Medicare and Medicaid program integrity, billing and collections, price transparency, credentialing, Focus Arrangements, Stark, and others as applicable.

In addition to assessing the target's risks and resources, the occasion of a transaction provides the acquirer an opportunity to reassess their own organization's risks and internal compliance resources with an eye toward improving the combined entity's compliance program effectiveness. Regardless of an organization's size or bottom line revenue, healthcare organization compliance functions rarely suffer from an embarrassment of resources to implement and sustain an effective compliance program. Avoiding the very common temptation to prematurely centralize or attempt to realize cost efficiencies at the expense of ensuring adequate transitory and sufficient ongoing compliance and associated revenue integrity resources is essential to satisfying another DOJ priority with respect to the question of whether the organization's program

is "applied earnestly and in good faith."[3] Alternatively, thoughtful compliance resource surge tactics include engaging independent external healthcare compliance experts leading or supplementing internal resources, thoroughly documenting the implementation efforts, and taking a time capsule approach to retaining the artifacts of the post-transaction compliance program story.

While Alexander the Man Who Knows reportedly did not reveal his techniques during his lifetime, proactive compliance program investment to mitigate the future retrospective liability of newly identified and post-transaction risks sounds like a technique straight out of a vaudeville era magician's playbook. Nevertheless, my recommendations for post-transaction healthcare compliance program good fortune will always include embracing the crystal ball view while planning for the "go."

Endnotes

1. Alexander (magician), available at *https://en.wikipedia.org/wiki/Alexander_(magician)*.
2. U.S. Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs (updated September 2024), pp. 9, 10, available at *https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl*.
3. *Id*. at pp. 1, 2.

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