

# **Compliance and Fraud & Abuse: An Investors Perspective**

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# Agenda

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- I. **Bank of America's Interest in Compliance and Fraud & Abuse**
- II. **Our Due Diligence Process**
- III. **Our Approach to Companies who are Under Investigation**
- IV. **How do Investors View Compliance and Fraud & Abuse Risk**

# Bank of America's Interest in Compliance and Fraud & Abuse

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- **Bank of America's Commitment to the Health Care Industry**
  - We are the largest health care lender in the US with almost \$20 billion invested
  - Significant concentrations in:
    - Hospitals
    - Long-Term Care
    - Home Health Care
    - Managed Care
    - PPMs
  - Number 1 in arranging and syndicating healthcare financings
  - Also among the leaders in high yield, high grade, and equity financings
- **Understanding the Risks to Health Care Companies is Key to our Ability to Provide Financing**
  - Pricing and interest rates will be contingent on the level of risk in the sector
  - Potential fines will have an impact on cash flow, interest coverage, and other covenants
  - Operational risks -- Will the provider be significantly impaired by a settlement or judgement? Is it possible that the company will be excluded from Medicare or Medicaid participation
  - HC investors require a high level of due diligence by the Syndication agent or Underwriter
- **Banks are Becoming more Familiar with Health Care Investigations/Fraud & Abuse**
  - Environment has changed over the last Seven years
  - Initially, banks were very apprehensive about lending to companies with any outstanding investigations
  - Now, Investigations may be a fact of life in the industry

# Bank of America's Due Diligence Process

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- **Health Care Compliance Check List (see attached)**
  - Required for all clients
  - Provides basic information about the company's compliance program
  - Is senior management involved? How good is the compliance program? Is it being successfully utilized?
  - Is there an ongoing education/training policy?
  - Review of contracts or relationships with physicians -- Stark implications
- **Company's Acquisition Strategy**
  - How does the company due diligence THEIR acquisitions?
  - Are acquisitions structured as stock or asset transactions?
  - Has the company negotiated for the seller to retain the risk for any potential fines?
- **Working with both the General Counsel and Outside Counsel**
  - If there is an investigation, an open dialogue is key to gaining comfort
  - What is the company's strategy in defending itself -- Fight until the end ? Move quickly to a settlement ?
- **Use of Third Party Consultants / Counsel**
  - Roughly 60% of the time, we (or the company) will retain a third party counsel or consultant to give an opinion
  - Helps investors gain some comfort, but, there are no guarantees

# Our Approach to Companies who are Under Investigation

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- **Where is the Company in the Process**
  - How long has the investigation been under way?
  - Does the company have a dialogue with DOJ or OIG?
  - Where are the subpoenas focused?
  - Is the company near a settlement?
  - Beyond monetary penalties, is the company exposed to exclusion or criminal prosecution?
- **Key is understanding the Company's Cash Flow Position**
  - How much of a fine could the company sustain?
  - Will future cash flows be at risk?
  - How much leverage does the company already have?
  - Does the company's valuation reflect the possibility of a major fine/settlement?
- **What is the Government's approach to the Case?**
  - Is the investigation in a new area of focus? Or is the investigation one of many in the industry?
  - Are there any guidelines for the size of settlement/fine?
- **Use of Third Parties (Outside Counsel & Consultants) are Typical**
  - Important in getting investors comfortable
  - Availability of the company's counsel is important as well
- **Investors views on Investigations**
  - 10% - 20% will not invest if there is a known investigation
  - Many banks/mutual funds/insurance companies have exited the healthcare market altogether - related to both fraud & abuse risk, as well as reimbursement risk
  - However, healthcare market remains strong, and has bounced back well from 2-3 years ago

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