Board of Directors Compliance Program Training

Presented by:
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Duty of Care

• Standard of Care Does Not Require Perfection:
  • Good faith;
  • Exercising the level of diligence, care and skill a prudent person would use under similar circumstances; and
  • Reasonable belief acting within the best interests of the Organization.
• Reasonable Inquiry.
Duty of Loyalty

• Avoid and/or disclose conflicts of interest;
• Act in best interest of the Organization; and
• Where disclosed conflicts exist, the remaining Board members without a conflict must carefully analyze transactions for fairness and reasonableness.
• Document what you did.
Duty of Obedience

• Comply with applicable laws, regulations and organizational policies.
  ➢ Requires more than mere compliance.

• Further the Organization’s charitable mission.
  ➢ Advance goals as expressed in Organization charter and bylaws.
  ➢ Prohibits unauthorized activities.
The Business Judgment Rule

- Even when a corporation’s ultimate outcome has been negative, Courts are reluctant to second-guess Boards of Directors that establish the Board followed a careful and thoughtful process during deliberations.
The Caremark Case

Established a Board’s Duty to Oversee Compliance Program:

“[A] director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the Board concludes is adequate, exists, and that failure to do so under some circumstances, may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.”

HHS OIG Provider Compliance Training

- Promote Quality of Care:
  - Policies and objectives defining quality improvement and safety program.
  - Incorporate objectives into performance evaluations.
  - Establish Board Quality Committee and make quality a standing Board agenda item.
  - Board expertise regarding services.
  - Ensure proper credentialing performed.
  - Implement and manage conflict of interest policy.
  - Use benchmarks and measures.
- Regulatory bodies reviewing meeting minutes.
Board Responsibility for Quality

- Effectiveness of quality improvement program?
- Quality improvement program improved?
- Appropriate Policies and Procedures?
- Quality measured?
- Board educated?
- Coordinated with Compliance Program?
- Reporting encouraged?
- Information reaching Board?
OMIG Characteristics of Quality Board Members

- Honest
- Open
- Fair
- Curious
- Objective
Audit Oversight
Not-for-Profit Reform

• **Audit Oversight:** Nonprofits are required to obtain an independent audit. The Board or a Board Audit Committee must provide oversight:
  – Review the scope of the audit with the auditor;
  – Discuss material risks with the auditor;
  – Resolve conflicts between the auditor and management; and
  – Annually assess the auditor’s performance.
Related Party Transactions
Not-for-Profit Reform

• Related Party Transaction Board Requirements:
  – Consider alternatives before entering into Related Party Transactions;
  – Transaction approval requires a Board majority vote;
  – Contemporaneously document in writing both the basis for majority approval, and the alternatives considered; and
  – Affirmatively determine that such transactions are in the Nonprofit’s best interest.
Mandatory Conflict of Interest Policy

Not-for-Profit Reform

• Mandatory Conflict of Interest Policy Must Include:
  – A definition of conflicts;
  – Procedures for disclosure of conflicts to Board or Committee;
  – Conflicted person must be recused from deliberations and voting on the subject;
  – Conflicted person may not attempt to improperly influence the vote;
  – Decisions involving a conflict must be documented in meeting minutes.
Whistleblower Policy
Not-for-Profit Reform

• **Mandatory:** For Organizations with 20 or more employees and annual revenues exceeding $1 million.

• **Whistleblower Policy Must Include:**
  – Reporting procedures for known or suspected violations of law or company policy;
  – A designated person to receive reports, who then reports that information to the Audit Committee;
  – Assurance of no retaliation; and
  – Distribution of the policy to officers, directors, employees and volunteers who provide substantial service to the Organization.
Board Independence
Not-for-Profit Reform

- No employee may serve as Board Chair or other position with similar Board responsibilities.
- Conflicts of interest or whistleblower deliberations must be made by a committee of independent Board members.
Modernization/Administrative Improvements
Not-for-Profit Reform

• **The Act Authorizes:**
  – Facsimile and e-mail transmission of Board and membership meeting notices, waivers of notice and votes requiring unanimous written consent.
  – Board members to participate in meetings via videoconference, Skype, and other forms of video communication.
  – Approval of non-substantial real estate transactions by majority vote of the Nonprofit’s Board or a Board Committee, rather than requiring a two-thirds vote of the entire Board.
    • If a Committee approves the transaction, the Committee must promptly notify the Board.
    • The two-thirds voting requirement is retained for transactions involving real property that constitutes all or substantially all of the Nonprofit’s assets.
Board of Director Guidance References

• Corporate Responsibility and Corporate Compliance: A Resource for Health Care Boards of Directors

  Published by: The Office of Inspector General of the U.S. Department of Health and Human Services, and American Health Lawyers Association

• Corporate Responsibility and Health Care Quality: A Resource for Health Care Boards of Directors

  Published by: The Office of Inspector General of the U.S. Department of Health and Human Services, and American Health Lawyers Association

• Right from the Start: Responsibilities of Directors and Officers of Not-for-Profit Corporations

  Published by: The New York State Attorney General’s Office

• Internal Controls and Financial Accountability for Not-for-Profit Boards

  Published by: The New York State Attorney General’s Office
Effectiveness of Compliance Programs

• OMIG is currently auditing compliance program effectiveness. Board involvement critical.

• **On-Site OMIG Visits Include:**
  – Staff and Board interviews
  – Review of Organization “culture”
  – Comprehensive review of Compliance Plan implementation
  – Site visits lasting up to a week
Enforcement Note:
The new Chief of the Charities Bureau at the NYS Attorney General’s Office is Jim Sheehan, former Medicaid Inspector General.
Thank you for your time.

Questions?

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