

OIG Releases Corporate Compliance Resource: Important Questions Every Board Member Must Ask

On April 2, 2003, the Department of Health and Human Services Office of Inspector General (“OIG”) and the American Health Lawyers Association (“AHLA”) published *Corporate Responsibility and Corporate Compliance: A Resource for Health Care Boards of Directors* (the “Resource”). While the OIG has previously issued many reports and released model corporate compliance programs, the Resource marks the first time that the OIG has ever provided specific guidance to boards of directors of healthcare entities (“Boards”) as to how they should assert their authority and discharge their responsibility to avoid personal responsibility and liability for violation of the fraud and abuse laws.

The Resource comes in the wake of several notorious scandals involving corporate wrongdoing and accountability, such as those involving Enron and Arthur Andersen. These scandals have given rise to public outrage against corporate wrongdoing and have increased public and governmental scrutiny over corporate officers and directors, as evidenced by the recently enacted Sarbanes-Oxley Act. Collectively, new laws and attention will ensure that corporate officers and directors are held to more certain and severe liability for corporate wrongdoing occurring under their watch.

Unique Challenges for Healthcare Entities

Healthcare organizations are subject to more rigorous and comprehensive regulation and scrutiny than most other enterprises. The ever-growing

and complex healthcare regulatory environment, and the myriad prohibitions, restrictions and conditions imposed on healthcare entities thereby, only intensifies the potential risk areas through which Board members must navigate.

To minimize the risks presented by the fiduciary duties (*e.g.*, the duty of care applicable to all healthcare providers), the OIG recommends that each Board member pay special attention to the manner by which he or she participates in compliance oversight as a Board member.

Questions Every Board Member Must Ask

While the OIG has not defined a specific standard of care for liability, the OIG does provide guidance in the form of various questions that must be asked and answered by Board members to ensure that they are properly upholding their obligations and fiduciary duties. These questions generally relate to the structure and operation of a healthcare entity’s corporate compliance program.

For example, each Board member must ask questions of its officers (*e.g.*, the chief compliance officer) regarding how the compliance program is structured, such as:

- How is the entity’s reporting system structured and monitored?
- How is the Board structured to address compliance?
- How are lines of communication established between the Board and its officers and staff?

- What resources are required for an effective compliance program?

In addition, the OIG also recommends that each Board member ask operational questions, such as:

- How are the organizational documents (*e.g.*, bylaws, code of ethics, etc.) drafted to ensure open lines of communication and the identification of risk areas?
- Does the compliance officer have the authority and resources necessary to implement the compliance program and speak directly to the Board regarding potential risk areas and issues?
- How does the organization ensure that employees and “whistle-blowers” are protected?
- How are employees and officers made accountable for compliance program failures?

These questions arise from the OIG’s position that each Board member must make reasonable inquiries to management personnel to obtain the information necessary to stay adequately informed of corporate actions and areas of risk. This in turn requires the Board to establish an effective communication system and a well-planned compliance infrastructure to ensure that (i) open lines of communication between officers and Board members exist, and (ii) appropriate questions are asked by Board members to uncover potential illegal activities. (Please see below for the individual questions identified by the OIG and contained in the Resource.)

Importantly, a Board member's failure to uphold his or her duty of care may result in removal of the Board member as well as personal criminal and civil liability, administrative action and/or tax liability.

Conclusion

In light of the above, every Board should review its organizational documents (e.g., bylaws, policies and procedures, code of ethics, compliance program and related documents) to

assess whether they ensure that adequate structural and operational elements are in place to provide open lines of communication and effective compliance oversight by the Board. Only by ensuring the efficacy of the compliance program can Board members avoid personal liability for corporate crime.

Our Healthcare Practice Group lawyers have substantial experience with compliance issues. If you have any questions regarding

the content of this Alert, please feel free to contact any of the attorneys listed below:

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The Questions Identified by the OIG

Operational Questions

1. How has the entity's code of conduct (or equivalent) been incorporated into corporate policies across the organization? How can the Board ensure that the code of conduct is understood by personnel?
2. Has the organization implemented policies and procedures that address compliance risk areas and established internal controls to counter these vulnerabilities?
3. Does the compliance officer have sufficient authority to implement the compliance program? Has management provided the compliance officer with the autonomy and resources necessary to perform assessments and respond to misconduct?
4. Have compliance related responsibilities been assigned appropriately? Are employees held accountable for compliance-related objectives during performance reviews?
5. What is the scope of compliance-related education and training across the organization? Has the effectiveness of such training programs been assessed? What policies/measures have been developed to enforce training requirements and to provide

remedial training as warranted?

6. How has the Board kept apprised of regulatory and industry developments affecting the organization's risks? How is the compliance program structured to address such risks?
7. How are "at-risk" operations assessed from a compliance perspective? Is conformance with the organization's compliance program periodically evaluated? Is the compliance program itself periodically evaluated?
8. What processes are in place to ensure that remedial measures are taken in response to identified risk areas and weaknesses?
9. How does the organization evaluate and respond to suspected non-compliance? How are reporting systems monitored?
10. Does the organization have policies regarding "whistleblowers" and the preservation of relevant documents and information?
11. What guidelines have been established for reporting compliance violations to the Board?
12. How does the entity report probable violations to government authorities?

Structural Questions

1. How is the compliance program structured and who are the key employees responsible for its implementation and operation? How is the Board structured to oversee compliance issues?
2. How does the organization's compliance reporting system work? How frequently does the Board receive reports about compliance issues?
3. What are the goals and limitations of the compliance program, and how are the latter addressed?
4. Does the compliance program address significant risk areas? How were such risks determined and how are new risks identified and addressed by the compliance program?
5. What resources are necessary to implement and sustain an effective compliance program as envisioned by the Board? How has management determined the adequacy of the resources so dedicated?

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