

A collection of symbolic objects including a chessboard, medals, a compass, and glasses.

Corporate Responsibility and Compliance

A Resource for Health Care
Boards of Directors

By Debbie Troklus, CHC and
Michael C. Hemsley, Esq.

HCCA



**HEALTH CARE
COMPLIANCE
ASSOCIATION**

Origin

A collaborative effort between the American Health Lawyers Association and the Office of Inspector General of the Department of Health and Human Services

- Principles of general applicability regardless of jurisdiction
- Focus is on the concept of reasonable inquiry as part of the Board's duty of care
- Designed to help directors ask knowledgeable and appropriate questions
 - Structural Questions – designed to explore the adequacy of program breadth, reporting relationships and resources to implement the program
 - Operational Questions – directed to an evaluation of the adequacy and vitality of the compliance program
- Planned Distribution to Boards of all health care organizations



Goal

- ◆ To highlight the relationship between the Board's fiduciary care and compliance program oversight responsibilities
- ◆ To suggest a series of questions to assist the Board in developing an informed judgment as to the vitality of its compliance program and to understand the challenges confronting compliance program implementation

Duty of Care

Duty of care involves determining whether the directors acted:

- In good faith
- With the level of care that an ordinarily prudent person would in like circumstances
- In a manner that they reasonably believe is in the best interest of the corporation

Director obligations with respect to duty of care

- ◆ Decision-making function:
 - Applying duty of care principles to a specific decision or board action
- ◆ Oversight function:
 - Applying duty of care principles with respect to the general activity in overseeing the day-to-day business operations of the corporation

In Re Caremark International Derivative Litigation

- Boards must assure themselves “that information and reporting systems exist in the organization that are reasonably designed to provide Senior Management and to the Board itself timely, accurate information to allow Management and the Board each within its scope, to reach informed judgments concerning both the corporation’s compliance with law and its business performance.”

In Re Caremark International Derivative Litigation

- “...It is important that the Board exercise a good faith judgment that the corporation’s information and reporting system is in concept and design to adequately assure the Board that appropriate information will come to its attention in a timely manner as a matter of ordinary operations, so it may satisfy its responsibility.”
- The Business Judgment Rule governs the level of detail appropriate for such information systems
 - Directors are entitled to rely in good faith on officers and employees, as well as consultants in whom such confidence is merited
 - Duty to make reasonable inquiry where facts warrant

The Development of Corporate Compliance Programs

- Risks associated with non-compliance have grown dramatically
- Designed to mitigate risks to health care organizations in a heavily regulated industry
- By 2002, substantial utilization of compliance programs across the industry (i.e., HCCA survey)
- Board compliance program oversight responsibility is an on-going element of the duty of care



AHLA/OIG Board Resource

- ◆ Focus is on the concept of reasonable inquiry as part of the Board's duty of care
- ◆ Designed to help Directors ask knowledgeable and appropriate questions

AHLA/OIG Board Resource

- ◆ 2 Categories of Questions are suggested for Directors:
 - Structural Questions – explore the Board’s understanding of the scope of the organization’s compliance program
 - Operational Questions – are directed to the operations of the compliance program

Structural Questions

- ◆ 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?
- ◆ How does the organization's compliance reporting system work?
- ◆ How frequently does the Board receive reports about compliance issues?

Structural Questions (cont)

- ◆ What are the goals of the organization's compliance program?
- ◆ What are the inherent limitations in the compliance program?
- ◆ How does the organization address these limitations?
- ◆ Does the compliance program address the significant risks of the organization?
- ◆ How were those risks determined and how are new compliance risks identified and incorporated into the program?

Structural Questions (cont)

- ◆ What will be the level of resources necessary to implement the compliance program as envisioned by the Board?
- ◆ How has management determined the adequacy of the resources dedicated to implementing and sustaining the compliance program?

Operational Questions

Code of Conduct

- How has the Code of Conduct or its equivalent been incorporated into corporate policies across the organization?
- How do we know that the Code is understood and accepted across the organization?
- Has management taken affirmative steps to publicize the importance of the Code to all of its employees?

Operational Questions (cont)

Policies and Procedures

- Has the organization implemented policies and procedures that address compliance risk areas, and established internal controls to counter those vulnerabilities?

Operational Questions (cont)

Compliance Infrastructure

- Does the Compliance Officer have sufficient authority to implement the compliance program?
- Has management provided the Compliance Officer with the autonomy and sufficient resources necessary to perform assessments and respond appropriately to misconduct?
- Have compliance-related responsibilities been assigned across the appropriate levels of the organization?
- Are employees held accountable for meeting these compliance-related objectives during performance reviews?

Operational Questions (cont)

Measures to Prevent Violations

- What is the scope of compliance-related education and training across the organization?
- Has the effectiveness of such training been assessed?
- What policies/measures have been developed to enforce training requirements and to provide remedial training as warranted?
- How is the Board kept apprised of significant regulatory and industry developments affecting the organization's risk?
- How is the compliance program structured to address such risks?

Operational Questions (cont)

- How are “at risk” operations assessed from a compliance perspective?
- Is conformance with the organization’s compliance program periodically evaluated?
- Does the organization periodically evaluate the effectiveness of the compliance program?
- What processes are in place to ensure that appropriate remedial measures are taken in response to identified weaknesses?

Operational Questions (cont)

Measures to Respond to Violations

- What is the process by which the organization evaluates and responds to suspected compliance violations?
- How are reporting systems, such as the compliance hotline, monitored to verify appropriate resolution of reported matters?
- Does the organization have policies that address the appropriate protection of “whistleblowers” and those accused of misconduct?

Operational Questions (cont)

- What is the process by which the organization evaluates and responds to suspected compliance violations?
- What policies address the protection of employees and the preservation of relevant documents and information?
- What guidelines have been established for reporting compliance violations to the Board?
- What policies govern the reporting to government authorities of probable violations of law?

Conclusion

The oversight activities provided by the director help form the corporate vision, and at the same time promote an environment of corporate responsibility that protects the mission of the corporation and the health care consumers it serves.

The perspectives shared in this resource are intended to assist the health care director in performing the important and necessary service of oversight of the corporate compliance program.