Compliance and the Board of Directors
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Learning Objectives:

1. Define the role of the Board of Directors in compliance programs
2. Describe ways to engage the Board of Directors in the compliance program
3. Identify resources that can assist board members
I. Role of the Board of Directors in Compliance Programs
The Board’s Fiduciary Duties

**Duty of Care**
The level of care that an ordinary prudent person would exercise in a like position under like circumstances

**Duty of Loyalty**
Undivided allegiance to the organization when making decisions affecting the organization

**Duty of Obedience**
Observance of, and faithfulness to, the organizational mission
Mandatory Compliance Programs

*In re Caremark International Inc. Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996)*

- A Board’s failure to adopt a compliance program may constitute a breach of fiduciary duties
- A director has a duty to attempt in good faith to assure:
  1. An information and reporting system exists
  2. The system is adequate to assure the board that appropriate information as to compliance with applicable laws will come to its attention in a timely manner as a matter of ordinary operations
Personal Liability of Directors

*In re Lemington Home for the Aged Comm. Of Unsecured Creditors, 777 F.3d 620 (3rd Cir. 2015)*

- Personal liability may result from breach of fiduciary duties
- Directors breached duty of care by failing to exercise reasonable diligence and prudence over the institution and its poorly performing management team
  - Allowed CEO to work on part-time basis in violation of state law

Compliance programs assist the board in ensuring the organization complies with applicable rules
Effective Compliance Programs: Seven Elements

1. Designate a Compliance Officer/Contact

2. Conduct internal monitoring and audits

3. Develop written standards and policies to implement the compliance program and govern operations

4. Conduct culturally and linguistically competent training and education programs
5. Develop effective, clear, open lines of communication between compliance and health center personnel - open door policy and policy prohibiting retaliation

6. Investigate detected problems and develop corrective action

7. Publicize and enforce disciplinary standards
For Organizations without an Established Compliance Program

• Pass resolution to establish the compliance program and approve the policies that define the organization’s compliance program framework

• Consider establishing a board-level committee to help oversee implementation of the compliance program

• Request regular reports from the CEO and (once appointed by the CEO) the Compliance Officer regarding progress in implementation of the compliance program
For Organizations with an Established Compliance Program

• Request an evaluation of the effectiveness of the organization’s compliance program annually
• Ensure funds budgeted for compliance program are sufficient and appropriate, considering the organization’s high risks
• Review and approve any modifications to the key policies and procedures that define the compliance program framework
• Request regular reports from the Compliance Officer regarding compliance program activities
Establishing a Compliance Committee

If the board decides to delegate some of the oversight activities, then it may establish a Compliance Committee to:

- Review policies
- Receive regular reports from the Compliance Officer
- Evaluate the compliance program, making recommendations to the full board
Board’s Role in Ensuring Compliance

• Review and update compliance program policies
• Review the annual compliance program work plan and monitor progress towards its implementation
• Receive regular reports from the Compliance Officer about compliance program activities
• Receive information and reports from the Compliance Officer about investigations of significant compliance concerns (as appropriate)
• Periodically evaluate the effectiveness of the compliance program
• Hold CEO accountable for compliance program effectiveness
General Compliance Advice for the Board

DO:

• Participate in training and education regarding compliance program and high risks
• Be prepared to be consulted and act aggressively if material compliance issues are identified
• Request periodic independent audits of the compliance program
DO NOT:

• Succumb to the temptation to be an outlet for employees who want to “end run” the established compliance process.

• Expect management to report all unsubstantiated allegations (as opposed to substantiated, significant compliance concerns).

• Pay lip service to compliance without a true commitment, including a commitment with words, actions, and financial support.
II. Engaging the Board of Directors in the Compliance Program
Orientation

New member on-boarding is an important opportunity to:

- Formally introduce the compliance program to new board members

- Communicate the organization’s commitment to conducting business in a manner consistent with the highest ethical principles and in accordance with all applicable laws and regulations
Orientation

• Be part of orientation for new board members

• If there is no formal board orientation:
  – Send a welcome letter to introduce the compliance program
  – Schedule the annual board compliance training as soon as possible

• Provide information:
  – All new members should receive:
    • Standards of Conduct
    • Compliance program policies and procedures
    • Compliance program work plan
  – New corporate compliance committee members should receive:
    • Board of Directors: Compliance Committee Charter
    • Board of Directors’ Compliance Committee Member List
    • Board of Directors: Compliance Committee Meeting Minutes
Training and Education

General compliance training should describe the compliance program and its various components, as well as the organization’s commitment to compliance with all applicable laws and regulations.

Additional topics to be covered include:

- The importance and operation of the compliance program
- The consequences of violating the policies and procedures
- The role of each individual in the operation of the compliance program
- Summary of applicable laws and regulations

Training should be conducted by or under the direction of the Compliance Officer.
Sample Training Agenda:

I. The Board’s Role in Compliance
   a. Fiduciary duties and Legal requirements
   b. Governance-management roles and responsibilities

II. Overview of Organization’s Compliance Program

III. High Risk Areas
   a. Fraud (billing and coding; documentation; cost-reporting; false claims)
   b. Procurements (kickbacks / self-referrals / safe harbor)
   c. Tax-Issues, Form 990s
   d. Privacy and security (HIPAA, Part 2)

IV. Compliance Program Resources
   a. Compliance Officer contact information
   b. Code of Conduct
   c. Other compliance program resources
Training and Education

- Report on meaningful metrics
- Turn board reports into training sessions
- Propose a series of trainings and have others help with the presentations
- Partner with other board committees
- Change the training method
- Invite board members to participate in staff compliance training and to report back to the full board
Training and education

Documentation should include:

- Board meeting minutes with the date, attendance, description of the compliance training, and name of the trainer
- Copy of training slides and materials, including introduction letters, bulletins or emails on compliance
- Signed statement of each board member acknowledging understanding of the organization’s Standards of Conduct and commitment to compliance.

The Compliance Officer should maintain the documentation to record the organization’s compliance efforts and the participation of the board.
On-going Communication

- Include board members on compliance program reminders and staff newsletters
- Provide board members with copies of news stories and new resources as they become available
- Respond honestly to compliance questions from board members and respond in a timely fashion
- Provide board members with the Compliance Officer’s direct contact information and the hotline
- Meet with board members who resign/retire their position to discuss the compliance program
III. Resources for the Board of Directors
OIG Guidance

• Given the growing enforcement environment and emphasis on compliance, OIG developed a series of resources for health care organization Boards of Directors

• These resources:
  – Describe the board’s duties and obligations related to the development, implementation, and oversight of a compliance program
  – Distinguish between the roles of in-house counsel and the Compliance Officer and their reporting relationships to the board
  – Recognize that oversight of quality of care is a core fiduciary responsibility of Board members and an emerging enforcement priority

• The first three resources include a series of suggested questions to assist boards in exercising their responsibilities related to the organization’s compliance and QI/QA programs
OIG’s Suggested Structural Questions

“Structural” questions to oversee and understand the scope, structure, goals and limitations of the program:

- 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 compliance reporting system work?
- How frequently does the board receive reports about compliance issues?
- 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?
- What will be the level of resources necessary to implement the compliance program as envisioned by the board?
OIG’s Suggested Operational Questions

“Operational” questions for periodic evaluation of program effectiveness and sufficiency of the reporting system:

• How has the Code of Conduct been incorporated into corporate policies across the organization? How do you know it is understood across the organization?

• Have compliance-related responsibilities been assigned across the appropriate levels of the organization?

• Has management provided the Compliance Officer with the autonomy and resources necessary to perform assessments and respond appropriately?

• What is the scope of compliance-related education and training across the organization?

• How is the board kept apprised of significant regulatory and industry developments affecting the organization’s risk?

• Does the organization periodically evaluate the effectiveness of the compliance program?
OIG’s Suggested Quality Questions

Questions to oversee and understand the scope and operation of quality and safety initiatives:

• What are the goals of the QI/QA program? What metrics and benchmarks are used to measure progress toward these goals?
• How are the QI/QA processes integrated into overall corporate policies and operations?
• Does the board have a formal orientation and continuing education process to help members understand the QI/QA program?
• What information is essential to the board’s ability to understand and evaluate the organization’s QI/QA program?
• How are the QI/QA processes coordinated with the corporate compliance program?
• What processes are in place to promote the reporting of quality concerns and to protect those who ask questions and report problems? What guidelines exist for reporting quality and/or patient safety concerns to the board?
OIG’s “Practical Guidance

The latest guidance from the OIG (published in 2015):

• Clarifies roles of, and relationships between, the board and the organization’s audit, compliance, and legal departments
• Emphasizes that compliance programs are not “one size fits all” and must be tailored to each organization
• Encourages the board to use public compliance resources as benchmarks
• Highlights two recent additions to the typical CIA:
  • Annual resolutions
  • Retention of experts
• Encourages the board to hold “executive sessions” to hear directly from leaders in compliance, legal, internal audit and quality

These reports and other compliance resources from OIG are available at this link:
http://oig.hhs.gov/compliance/compliance-guidance/compliance-resource-material.asp
Questions?

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