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Strengthening boards strengthens compliance

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Healthcare providers have endured a barrage of new and more exacting regulations resulting from broad changes brought about by the Health Information Technology for Economic and Clinical Health (HITECH) Act, the Affordable Care Act, the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA), and other laws. The American Hospital Association estimated that, in 2016 alone, hospitals and other post-acute care providers faced nearly 24,000 pages of new federal regulations.[1]

Compliance officers often have the first task of sorting through these pages to understand how these rules change compliance and reporting obligations. This regulatory bombardment coupled with increased enforcement likely explains why most compliance officers report losing sleep or considering other work.[2] Compliance officers may stand on the front lines during this period of change, but they do not face this challenge alone. The Joint Commission notes that little doubt exists under the law about who has ultimate responsibility for compliance—the board of directors.[3]

The Department of Justice (DOJ) announced $2.4 billion in False Claims Act recoveries in 2017 from drug companies, hospitals, pharmacies, laboratories, and physicians.[4] The complexity of the regulatory environment increasingly means that directors can face personal liability from government agencies or aggrieved shareholders for False Claims Act and other violations.[5]

Additionally, as part of corporate integrity agreements (CIAs) with the U.S. Department of Health and Human Services Office of Inspector General (HHS OIG), boards are often required to develop an annual resolution certifying that the board has made a reasonable inquiry into the organization's compliance program and concluded that, to the best of its knowledge, the compliance program is effective.[6]

Healthcare organizations can best reduce enterprise risk, equip their compliance officers to succeed, and limit personal liability for directors by creating a solid foundation for corporate governance. Compliance officers can assist in this task by engaging in meaningful discussions with other officers about four basic steps that can enhance corporate governance and produce better compliance.

Step 1 – Focus on board recruitment and retention

A quick Amazon search yields hundreds of books about what makes a board of directors "extraordinary," "take charge," or "high performing." Many of these works can be reduced to this self-evident principle: the right board has the right people. Stating this principle, however, is easier than fulfilling it. More than half (52%) of board chairs at nonprofit organizations report that it is difficult or very difficult to find the right board members.[7]

Board recruitment is hard work that requires consistent attention from the organization's executives, including the compliance officer, and the board itself. Effective boards, though, tend to have common characteristics:

substantively qualified, independent, diverse, and attentive directors. Focusing on the attributes described below can help organizations create "high performing" boards.

Substantive skills

Creating an effective governing board for a healthcare organization requires individuals who draw on diverse skills. Many organizations follow a check-the-box approach to make sure they have someone with legal, accounting, and business experience. Having these skills matters, but organizations should also contemplate how changes in the regulatory environment affect the substantive backgrounds their directors should have.

Compliance officers can assist their organizations by identifying these areas and evaluating potential board candidates. For example, many recent regulatory changes reflect rapid advances in technology and the use of digital information. Others push healthcare providers from a fee-for-service reimbursement methodology to one that emphasizes quality of care. Healthcare organizations should consider whether their boards reflect these disciplines. Identifying individuals who have computer, cybersecurity, or similar training may help less technologically savvy directors understand new federal and state mandates and the steps organizations must take to satisfy them. Recruiting individuals who have population health or nursing experience can similarly provide insight for other directors about quality-of-care issues that Medicare and other payers now stress. A recent headline in The New York Times put it succinctly: In Hospitals, Board Rooms Are as Important as Operating Rooms.[8]

Independence

Board member independence is a key compliance consideration for healthcare organizations regardless of their tax status. The IRS has emphasized the need for charitable organizations to have a board of directors that consists of a majority of independent directors. Similarly, exchange listing rules for publicly traded companies require a board of directors with a majority of independent directors.[9] Privately held organizations should also consider the value that independent directors offer. The OIG, for example, has stressed the importance of independence by requiring at least one independent director as part of CIAs.[10] Given this focus, compliance officers, together with other executives, should regularly evaluate the independence of directors and board candidates.

Conflicts of interest

Conflicts of interest should be considered as part of the healthcare organization's process for evaluating individuals to serve on the board of directors. Failing to identify potential conflicts of interest could signal to regulatory authorities or aggrieved shareholders that the organization or its leaders failed to act with appropriate diligence. Conflicts of interest policies can help guide this evaluation, but healthcare organizations should ensure these policies look beyond financial conflicts of interest to other relationships that may suggest an individual cannot act solely in the best interests of the organization.

Effective policies will address potential "dualities of interest" that directors face, meaning any scenario where a director's financial or other interests diverge from their fiduciary duties to the organization. Directors must protect the organization's integrity and reputation in all aspects of business and governance and abstain from influencing (or appearing to influence) business and policy decisions in a manner that is not in the organization's best interests. Healthcare organizations should expand the scope of their conflict inquiry by requiring disclosure of other interests that could create questions of divided loyalties, such as:

- Situations in which an individual serves as an officer, director, or advisor of an organization that competes with or seeks to do business with the organization;

- Direct or indirect compensation arrangements with any company that produces competing services or products; and
- Circumstances in which a director has an ability to derive a material benefit from confidential or proprietary information.

Healthcare organizations should also consider whether directors have complied with annual conflict-of-interest disclosure requirements when considering reappointment. A recent study found that 15% of executives reported that their boards did not review and sign conflict-of-interest disclosures on an annual basis.[11] Failing to satisfy this minimal level of corporate oversight can expose the organization and the individual directors to significant legal risk and reputational damage.

Diversity

Healthcare organizations can enhance corporate governance by recruiting board members who reflect the diversity of their communities. The Institute for Diversity in Health Management found that, in 2015, only 14% of directors at hospitals were minorities, while minorities represented 32% of patients in those hospitals.[12] Individuals with diverse backgrounds may approach issues that come before the board from different perspectives, offering new insights that can help identify and resolve problems before they arise.[13] The American Hospital Association believes that increasing diversity on governing bodies can help hospitals better address disparities in healthcare services in their communities.[14] Healthcare organizations can help foster diversity among their boards of directors by writing diversity principles into their director selection process, evidencing an intent to work toward representation at a governance level that is commensurate with the communities the healthcare organization serves.

Board culture

Bad culture produces bad conduct. The board is the starting point for ensuring a corporate culture that can identify, assess, and address compliance issues. Healthcare organizations should make sure that potential directors will foster a collaborative culture that enables individuals to ask hard questions and address difficult issues in a respectful environment. Creating the right culture for the board takes ongoing commitment from individual directors as well executives. Having directors and organization executives interview board candidates about how they would review their responsibilities as a director and requiring references are fundamental aspects of protecting or enhancing board culture. Healthcare organizations can further support this environment through formal leadership programs to educate directors on the roles of management and governance, conflict resolution, healthcare compliance, and health industry trends.[15]