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BEST PRACTICES IN CORPORATE GOVERNANCE

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AGENDA

- Director Responsibilities
- Recent Rulings
- The “Yates Memo”
- Directors’ Roles in Compliance
- Quality Oversight



HEALTH CARE FRAUD STATISTICS

- During Fiscal Year (FY) 2014, the Federal government won or negotiated over \$2.3 billion in health care fraud judgments and settlements.
- Justice Department recovered over \$3.5 billion from False Claims Act cases in FY 2015.
- New York-Presbyterian Hospital and Columbia University Medical Center together on May 7 have agreed to hand over a whopping \$4.8 million to settle alleged HIPAA violations after the electronic protected health information of 6,800 patients wound up on Google back in 2010.



DIRECTOR RESPONSIBILITIES

- Duty of Loyalty
- Duty of Care
- Duty of Obedience





DUTY OF LOYALTY

- Act in good faith.
- Act in the best interests of the corporation.
- Conflicts of Interest
 - Recuse himself or herself when appropriate.



DUTY OF CARE

- **Decision Making Function**
 - Example: Medical Staff Credentialing Issues
- **The Oversight Function**
 - Keeping a finger on the pulse of the activities of the organization
- **Quality of Care Issues**
- **Overseeing the Compliance Program**
- **The need to review corporate minutes**



BUSINESS JUDGMENT RULE



- The rule provides that a director will not be held liable for a decision made in good faith, where the director is disinterested, reasonably informed under the circumstances, and rationally believes the decision to be in the best interests of the corporation.
- Courts will not second guess the board members.
- Can rely on information from management unless they have a reason to believe the reliance is unwarranted.



DUTY OF OBEDIENCE



- Understand the mission and purpose of the organization.
- Directors are charged with the obligation to further the purpose of the organization.
- The concept of quality of care is inseparable from the mission of the organization.
- To obey the laws the organization is subject to!



LIABILITY OF A DIRECTOR



- Liable for failing to reasonably oversee the organization's Compliance Plan or for acting as mere passive recipients of information.
- Liability arises when:
 - The directors fail to implement any reporting or information systems or controls.
 - The directors consciously fail to monitor or oversee operations, thus disabling themselves from being informed of risks or problems requiring their attention.
 - Failure to provide oversight - not managing day-to-day affairs.



RECENT RULINGS

- **In re: Caremark**
 - Directors are potentially liable for a breach of duty to exercise appropriate attention if they knew, or should have known, that employees were violating the law, declined to make a good faith effort to prevent the violation, and the lack of action was the proximate cause of damages.
- **In re: Intuitive Surgical**
 - The Court held that Plaintiff offered sufficient particularized factual allegations that strongly support an inference that the entire board, or at least a majority, knew of violations of law committed by Intuitive and did nothing.



THE YATES MEMO

- Sally Quinlan Yates
Deputy Attorney General
- Issued September 9, 2015



THE YATES MEMO (Cont'd)

- **Six key steps that strengthen pursuit of individual corporate wrongdoing:**
 - Cooperation credit requires identification of all individuals responsible for the misconduct;
 - Investigations should focus on individuals from the investigation's inception;
 - Criminal and civil attorneys should communicate with each other during the investigation;



THE YATES MEMO (Cont'd)

- Six key steps continued:
- The DOJ will only release culpable individuals in extraordinary circumstances or in accordance with DOJ policy;
- DOJ will not resolve matters without a clear plan to resolve related individual cases;
- Civil attorneys should focus on individuals to evaluate whether to bring suit against an individual beyond consideration of ability to pay.



HOW A CORPORATION SHOULD RESPOND

- Communicate and Educate
- Focus on the Compliance Program
- Address non-compliance promptly and appropriately
- Be prepared for more complex and drawn out investigations and settlement negotiations
- Prepare and issue Upjohn warnings



BEST PRACTICES OF INTEGRATING DIRECTORS INTO A COMPLIANCE PROGRAM

- Act in good faith to exercise its oversight responsibility and make inquiries;
- Familiarize themselves with and follow the Federal Sentencing Guidelines, OIG's voluntary compliance program guidance documents, and OIG Corporate Integrity Agreements (CIAs);
- Stay abreast of the ever-changing regulatory landscape and operating environment;
- Raise their level of substantive expertise with respect to compliance matters by director selection and by consulting with experts;



BEST PRACTICES (Cont'd)



- Receive regular reports regarding the organization's risk mitigation and compliance efforts from those responsible for audit, compliance, human resources, legal, quality, and information technology;
- Conduct "executive sessions" with leadership from compliance, legal, internal auditing, and quality functions to encourage more open communication;
- Be informed of emerging trends in the health care industry to increase transparency
 - CMS Quality Compare Measures
 - Sunshine Act



BEST PRACTICES (Cont'd)



- Establish a committee or subset of the Board to monitor Compliance Program operations and regularly report to the Board;
- Have the Code of Conduct operate as a constitution for the organization;
- Ensure the proper infrastructure, power and reporting structure for the Compliance Program;
- Participate in compliance training;
- Ensure the Compliance Program has a standard for responding to violations; and
- Ensure the Compliance Program includes guidelines for reporting a violation.



QUESTIONS?