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## FIDUCIARY DUTIES

### DEFINITIONS

- **Director** is define as one who manages, guides, or orders; a chief administrator. A person appointed or elected to sit on a board that manages the affairs of a corporation or other organization by electing and exercising control over its officers.
- **Fiduciary** is define as a person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor. Black's Law Dictionary, Revised 4<sup>th</sup>. Edition.
- **Fiduciary Duty** is define as a duty of utmost good faith, trust, confidence and candor owed by a fiduciary to the beneficiary; a duty to act in the highest degree of honesty and loyalty toward another person and in the best interests of the other person. Black's Law Dictionary, Revised 4<sup>th</sup>. Edition.

## GENERAL POWERS

- GENERAL CORPORATION ACT- Act No. 164, December 16, 2009.
- Section 2.01.: Every corporation, its officers, directors, stockholders and other members shall possess and may exercise all of the powers and privileges granted by this or other Acts or by the certificate of incorporation, in addition to such other powers incidental thereto, provided that such powers and privileges are necessary or convenient for the attainment or promotion of the businesses or purposes set forth in the certificate of incorporation.

## BOARD RESPONSIBILITIES

- 1) Monitoring the corporation's performance in light of its operating, financial, and other significant corporate plans, strategies, and objectives, and approving major changes in plans and strategies;
- 2) Selecting the CEO, setting goals for the CEO and other senior executives, reviewing their compensation, and making changes when appropriate;
- 3) Developing, approving, and implementing succession plans for the CEO and top senior executives;
- 4) Understanding the corporation's risk profile and reviewing and overseeing the corporation's management of risks;

## BOARD RESPONSIBILITIES (Cont.)

- 5) Understanding the corporation's financial statements and other financial disclosures and monitoring the adequacy of its financial and other internal controls, as well as its disclosure controls and procedure;
- 6) Evaluating and approving major transactions such as mergers, acquisitions, significant expenditures, and the disposition of major assets; and
- 7) Establishing and monitoring effective systems for receiving and reporting information about the corporation's compliance with its legal and ethical obligations.

## DIRECTORS AND OFFICERS

- **In Section 4.01.(c)(1)** The Board of Directors may, by resolution adopted by a majority of the entire board:
  - Designate one or more committees;
  - Composed of one or more directors of the corporation;
  - Designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member in any meeting of the committee;
  - Such committees shall have and may exercise the powers of the board of directors in the management of the business and affairs of the corporation; and
  - Such committees shall not have the power to remove or elect officers and amend the certificate of incorporation.

## DIRECTORS AND OFFICERS (Cont.)

- **In Section 4.02.(i)-*Officers, Selection, Term & Duties*:** A member of the board of directors, or a member of any committee designated by the board of directors shall, in discharging his/her duties, be fully protected and exempted from responsibility for relying in good faith on the records of the corporation and on the information, opinions, reports or statements presented to the corporation by any of the officers or employees of the corporation, or committees of the board of directors, or by any other person as to issues which the member reasonably believes are within the scope of the professional or expert competence of such person who has been selected reasonably careful by or on behalf of the corporation.

## DIRECTORS AND OFFICERS (Cont.)

- **In Section 4.03.-*Obligations of the Directors or Officers in the Discharge of their Functions*:** The directors and officers shall be bound to dedicate to the affairs of the corporation and to the exercise of their duties the attention and care which in a similar position and under analogous circumstances, a responsible and competent director or officer would execute in applying his/her business judgment in good faith or his/her best judgment in the case of nonprofit corporations. Only gross negligence in the exercise of the duties and obligations mentioned above shall result in personal liability.

## INDIVIDUAL DIRECTOR'S RESPONSIBILITIES

- **UNDERSTANDING THE CORPORATION AND ITS INDUSTRY:**
- 1) The corporation's business plan;
- 2) The key drivers underlying the corporation's profitability and cash flow-how the corporation makes money both as a whole and also in its significant business segments;
- 3) The corporation's operational and financial plans, strategies, and objectives and how they further the goal of enhancing shareholder value;
- 4) The corporation's economic, financial, regulatory, and competitive risks, as well as risks to the corporation's physical assets, intellectual property, personnel, and reputation;
- 5) The corporation's financial condition and the results of its operations and those of its significant business segments for recent periods; and
- 6) The corporation's performance compared with that of its competitors.

## DIRECTORS' RIGHTS

- 1) To inspect books and records;
- 2) To request additional information reasonably necessary to exercise informed oversight and make careful decisions;
- 3) To inspect facilities as reasonably appropriate to gain an understanding of corporate operations;
- 4) To receive timely notice of all meetings in which a director is entitled to participate;
- 5) To receive copies of key documents and of all board and committee meeting minutes; and
- 6) To receive regular written and oral reports of the activities of all board committees.

## DUTY OF CARE

- The decision making function: The application of duty of care principle to a specific decision or a particular board action; and
- The oversight function: The application of duty of care principles with respect to the general activity of the board oversight the day to day business operations of the corporation; i.e. the exercise of reasonable care to assure that corporate executives carry out their management responsibilities and comply with law.
- Duty of Care Principles :
  - Time commitment and regular attendance.
  - Need to be informed and prepared.
  - Right to rely on others.
    - corporate Officers or employees whom directors reasonable believe to be reliable and competent in the matters presented;
    - legal counsel, public accountants, or other persons as to matters that the directors reasonably believes to be within their professional or expert competence or as to which the person otherwise merits confidence; and
    - Committees of the boards on which the director does not serve.
- Inquiry

## DUTY OF LOYALTY

- **Section 4.04.-Duty of Loyalty of Directors, Officers and Majority Shareholders** says: Whenever directors, officers and majority shareholders have personal interests in matters affecting the corporation, they shall be subject to a duty of loyalty which bounds them to act fairly in relation to corporate issues.

## **DUTY OF LOYALTY (Cont.)**

### **ACTING IN GOOD FAITH**

- intentionally acting with purpose other than advancing the corporation's best interests;
- failing to act when there is a known duty to act;
- acting with the intent to violate, or with intentional disregard of an applicable law;
- failing to cause the corporation to establish internal controls, risk management, or monitoring and compliance systems; or
- failing to respond to red flags.
- Conflict of Interest
- Fairness to the Corporation
- Corporate Opportunity

## **BUSINESS JUDGMENT RULE**

Presumes that in making a business decision, independent and disinterested directors acted on an informed basis, in good faith, and in the honest belief the action taken was in the best interest of the corporation.

If the court determine that the director acted on an independent, disinterested and informed basis, in good faith, and in the honest belief the action taken was in the best interest of the corporation, the director will be protected from personal liability, even if the board's decision turns out to be unwise or the result of the decision are unsuccessful.

## Regulatory Laws of Fraud in Health Care

- False Claims Act
- Stark Law
- Anti-Kickback Law
- HIPAA
- Balance Budget Act
- Civil Monetary Penalty Law
- Health Care Fraud
- Sarbanes Oxley Act of 2002

## COMPLIANCE PROGRAMS

Public Law 111-148, known as the Patient Protection and Affordable Care Act of 2010, as amended by Public Law 111-152, known Health Care and Educational Reconciliation Act of 2010, collectively known Affordable Care Act ("ACA"), significantly expanded compliance risks for health care entities in a number of areas. In addition, Section 6401 of ACA provides that a provider of medical or other items or services or supplier within a particular industry sector or category "shall establish a compliance program as a condition of enrollment in Medicare, Medicaid, or the Children's Health Insurance Program ("CHIP)".



## COMPLIANCE PROGRAMS (Cont.)

### HHS-OIG GUIDELINES:

- Flexible approach will permit hospitals to tailor programs to fit their needs and financial resources. "one size does not fit all"
- Seven fundamental elements of an effective compliance program:
  - Written Policies, Procedures and Standards of Conduct;
  - Designation of a Compliance Officer and Compliance Committee, and High-Level of Oversight;
  - Conducting Effective Training and Education;
  - Developing Effective Lines of Communication;
  - Enforcing Standards Through Well-Publicized Disciplinary Guidelines;
  - Effective systems for routine Auditing and Monitoring:
    1. ensure that Internal Auditors are Independent,
    2. do not engage in self-policing
    3. are knowledgeable of Medicare & Medicaid Programs requirements.
    4. have access to relevant personnel, information, records, and operational areas;
  - Prompt Respond to Detected Offenses and Developing Corrective Active Initiatives.

## CORPORATE RESPONSIBILITY AND HEALTH CARE QUALITY

According to the Institute of Medicine, health care should be:

- **Safe:** avoiding injuries to patients from the care that is intended to help them;
- **Effective:** providing services based on scientific knowledges to all who could benefit and refraining from providing services to those not likely to benefit (avoiding underuse and overuse, respectively);
- **Patient-Centered:** providing care that is respectful of and responsive to individual patient preferences, needs and values and ensuring that patient values guide all clinical decisions;
- **Timely:** reduction waits and sometime harmful delays for both those who received and those who give care;
- **Efficient:** avoiding waste, including waste of equipment, supplies, ideas and energy; and
- **Equitable:** providing care that does not vary in quality because of personal characteristics such as gender, ethnicity,, geographic location, and socio-economic status.

## CORPORATE RESPONSIBILITY AND HEALTH CARE QUALITY (Cont.)

Boards oversight patients safety and quality issues by:

- Understanding the emergence of quality of care issues, challenges and opportunities;
- Oversight the development of specific quality of care measurements and reporting requirements, including asking the executive staff for periodic education; and
- Requesting periodic updates from the executive staff on organizational quality of care initiatives and how the organization intends to address legal issues associated with those initiatives.

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