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New OIG Guidance Assists Health Care Board Members Meet Compliance Obligations

On April 2, 2003, the Office of the Inspector General of the Department of Health and Human Services (OIG), in collaboration with the American Health Lawyers Association, released guidance intended to help directors of health care organizations understand their obligation to oversee the compliance activities of their respective organizations. In the wake of recent accounting scandals at Enron and HealthSouth, and following the passage of the Sarbanes-Oxley Act, this guidance serves as an additional indicator of the renewed attention being paid by regulators to the obligations of corporate directors.

The OIG guidance, entitled "Corporate Responsibility and Corporate Compliance: A Resource for Health Care Boards of Directors," alerts directors of both nonprofit and for-profit health care organizations that they will be personally subject to civil and criminal penalties if they fail to address fundamental compliance problems within their organizations. Because the health care industry is regulated by a uniquely broad set of laws and regulations, it is important for directors of health care entities, including hospices, to be able to affirmatively establish that they have provided adequate direction and oversight regarding their organizations' varying legal compliance obligations. As a starting point, directors of hospices should determine whether their organization has adopted an appropriate compliance plan to address: (1) health care fraud and abuse laws (including anti-kickback, physician self-referral and false claims laws), (2) conflicts of interest and business ethics laws, and (3) privacy laws and regulations (including the newly effective HIPAA Privacy Rule), as such laws are applicable to their organization.

To assist directors in understanding how organizational compliance impacts directors' personal liability, the OIG guidance outlines the fiduciary duty owed by directors to their organizations and describes the obligation of directors to make a "reasonable inquiry" into the effectiveness of their organizations' compliance activities. The OIG guidance provides directors with a list of 18 questions that they can ask their organization's management team to: (1) better educate themselves regarding their organization's compliance efforts, and (2) help protect themselves from unnecessary exposure to liability. Important questions include:

- Who are the key employees responsible for implementing and operating your organization's compliance program?

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- What is the process by which your organization evaluates and responds to suspected compliance violations?
- Have policies and procedures been implemented to respond to the day-to-day compliance risks faced by the organization?
- What level of resources is necessary to implement an adequate compliance program as envisioned by the board? Is the current allocation of resources adequate?
- What is the scope of compliance-related education and training across the organization?
- How is the board kept apprised of new regulatory and industry developments affecting the organization's risk?

The release of this OIG guidance is a clear indication that the federal government is placing a renewed emphasis on enforcing the compliance obligations of directors. This increased federal attention coincides with an increase in the number of claims being brought against corporate directors by state attorneys general as well as private plaintiffs.

As a result, board directors of hospices need to take affirmative steps to assure that they are providing adequate oversight with respect to the compliance activities of their organizations. To meet their obligations, directors must ensure: (1) that a compliance reporting system exists within their organization, and (2) that the reporting system is designed to ensure that appropriate compliance information will be directed to the board in a timely manner. If directors fail to fulfill these obligations, they may be personally at risk for the legal compliance failures of their organization.

You can review the full OIG compliance guidance for directors at the OIG website.

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