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Re-Visiting Hospice Organizational and Governance Issues: What to Consider as Changes Occur in a Hospice Organization

As a hospice grows and changes, the organization's corporate or limited liability company (LLC) structure should grow and change along with it. In addition, there are federal and state reporting requirements that a hospice must meet as changes occur within the organization. Finally, regulators continue to emphasize good corporate governance as an important factor in a health care provider's overall corporate compliance efforts. This article provides a high-level overview of several items that a hospice should consider as changes occur within its organization or to bolster its corporate compliance program. Some items relate to all hospice entities, while others specifically impact hospices that are exempt from federal income taxation.

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Examine Organizational Documents

Whether a hospice is organized as a corporation, an LLC, or any other state-approved legal entity, the company has organizational documents (*e.g.* articles of incorporation, bylaws, articles of organization, operating agreement, etc.) that control the operations of the hospice. Be sure that these documents (a) properly reflect the purposes and powers of the company; (b) comply with applicable state business organization laws; (c) comply with applicable state hospice licensing requirements; and (d) properly reflect the day-to-day operation of the company. If your organizational documents are outdated, form a committee to review the documents with the help of outside experts, as necessary.

New Service Line or Location? Consider Forming a Separate Legal Entity

Has a hospice added (or considered adding) a service line (*e.g.* non-hospice palliative care) or another separately licensed and certified location, such as in a neighboring state? If so, consider whether to operate this new service line or location out of a separate legal entity to protect the assets of the organization as a whole. In some cases, a separate legal entity will be necessary for state licensing issues; for example, some states do not allow a hospice to operate a non-hospice palliative care program out of the licensed hospice entity. Also, if the hospice is looking to expand its hospice services into a new geographic area, the preferred mode of expansion might actually be through acquisition of an existing hospice program, given delays in initial Medicare certification of new hospices and the costs and time associated with the process.

IRS Form 990—New Challenges for Tax-Exempt Organizations

If the hospice organization is exempt from federal income taxation under the Internal Revenue Code, the re-design of the IRS Form 990 should cause the organization to look closely at its governance policies. Part VI of the Form 990 references several governance-related policies and procedures, including a conflict of interest policy, whistleblower policy and executive compensation policy (among others). While adoption of these policies is not required in order to maintain tax-exempt status, the fact that the organization implemented and followed policies on these and other topics would no doubt be viewed as a positive factor in any IRS audit or examination of the organization. In addition, these policies make good corporate sense and might be otherwise required by law. For example, providers that make or receive at least $5 million in annual Medicaid payments must provide to employees, contractors and agents, in written policies, information on applicable false claims laws and whistleblower protections under such laws.

Governing Board Independence

Again, for organizations exempt from federal income taxes, the "independence" of a majority of governing board members is becoming a best practice or even a requirement in some instances. The organization should adopt a policy for determining whether a governing board member is considered an "independent" member of the organization (*i.e.* is not an employee and does not have material financial relationships with the organization). Also, the IRS Form 990 asks organizations to disclose the number of independent members of its governing board. Any companies listed on the New York Stock Exchange or NASDAQ also need to be cognizant of the listing requirements of those exchanges, including a requirement that a majority of the governing board must be comprised of independent members.

Medicare Requirements for a Hospice Governing Body

If a hospice participates in the Medicare program, the hospice governing body must meet certain requirements under the Medicare hospice conditions of participation. For example, a hospice needs to show that its governing body provides oversight for its quality assessment and performance improvement (QAPI) program. The governing body is also responsible for assuming full legal authority and management of the hospice, the provision of hospice services and its fiscal operations, and for appointing a qualified administrator responsible for the day-to-day operation of the hospice. State hospice licensure law may also impose additional requirements on the hospice governing body. Surveyors will look for evidence that these conditions are met, so be sure that the governing body is given these powers via the company's organizational documents or through company policies and procedures, and be sure that governing body meeting minutes indicate that these items are considered by the governing body on a regular basis.

Corporate Compliance and Quality of Care

The Department of Health and Human Services, Office of the Inspector General (OIG) has continued to highlight the responsibility of a health care organization's governing board to exert oversight over both the organization's compliance efforts and the quality of the care provided by the organization. Again, policies and procedures should be developed to memorialize the governing board's oversight over these key areas, including a corporate compliance program that is developed to meet the particular risk areas facing the hospice.

CMS 855A Form Updates

Many Medicare-certified providers do not realize that when an organization changes directors, officers, managing employees or owners, these changes must be reported to the organization's Medicare fiscal intermediary (or Medicare Administrative Contractor) as an update to the company's CMS 855-A enrollment form. These changes must generally be reported within 90 days of the effective date of the change. The change is reported as a change of information on the CMS 855-A unless the organization has not filed a CMS 855-A since November 2003, in which case an entire new 855A must be submitted. There are other changes that must be reported on the CMS 855-A form prior to the effective date of the change, including the addition of a hospice multiple location or a change of address for the hospice.

While not all of these items will be applicable to each hospice, it is important to consider these and other items as the hospice organization grows and changes. For more information about any of these considerations, please contact any member of the Hospice and Palliative Care Group at Reinhart Boerner Van Deuren s.c.