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## Office of Inspector General Issues Guidelines For Hospital Board Oversight of Compliance Programs

On April 2, 2003, the Office of the Inspector General (“OIG”) of the U.S. Department of Health and Human Services, in collaboration with the American Health Lawyers Association, issued guidelines addressing the responsibility of healthcare boards of directors (“Boards”) to oversee their institutions’ compliance programs. The OIG describes the guidelines as an “educational resource” that is designed “to help health care organization directors ask knowledgeable and appropriate questions related to health care corporate compliance.” The guidelines first explain the duty of care that healthcare directors owe to their corporations. Next, the guidelines describe how that duty of care applies to the oversight of compliance programs. Finally, the guidelines provide a list of questions to assist directors in understanding, evaluating, and governing compliance programs.

The guidelines’ description of the duty of care is a likely indicator of the standard that the OIG expects healthcare directors to fulfill. The OIG acknowledges that the appropriate standard of care for directors is not “perfection”. Although Washington may have additional statutory protections, many courts apply some form of the “business judgment rule” when determining whether a director met the duty of care. The guidelines state:

The [business judgment] rule provides, in essence, 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 interest of the corporation.

The business judgment rule’s requirement that a Board be reasonably informed is crucial to fulfilling the Board’s responsibility to oversee a compliance program. The OIG asserts that a Board’s oversight duty has two principal obligations. A Board must first assure that a reporting system exists and, second, that the system is adequate to provide the Board with timely and appropriate information regarding the corporation’s compliance with applicable laws.

Fortunately, the OIG recognizes that a Board is permitted to rely on the oversight of officers, employees, and professionals, if confidence in those individuals is merited. A Board cannot rely on the company’s officers, employees or professionals if the Board is aware or should be aware of facts that are suspicious or that make such reliance unwarranted. Although the OIG does not expect the Board to act as a compliance officer, the guidelines explain that a Board must receive and consider information that is adequate to enable the Board to oversee senior management’s operation of the compliance program.

The guidelines contain a serious discussion of the risks to providers and the risks of personal liability to directors who do not fulfill their duty to oversee corporate compliance pro-

grams. The OIG concedes that providers face both the challenges of caring for patients and an extensive and complex regulatory environment. Despite the difficulty of providing healthcare in these circumstances, providers and directors face substantial sanctions for noncompliance. The guidelines warn that in the current “corporate responsibility” environment, a number of parties could seek to hold directors personally liable for compliance breaches. For example, in addition to federal agencies, shareholders of for-profit corporations, regulatory agencies such as the Securities and Exchange Commission, state attorneys general, and dissenting directors are all possible adversaries. The OIG then explains that the purpose of the guidelines is to assist Boards in avoiding sanctions or liability by exercising their responsibility to oversee corporate compliance programs.

The guidelines conclude with sets of questions and comments that the OIG intends to provide a methodology by which Boards can oversee their organization’s compliance program. The first five series of questions are “structural questions [that] explore the Board’s understanding of the scope of the organization’s compliance program.” These questions include:

How is the compliance program structured and who are the key employees responsible for its implementation and operation?

How frequently does the Board receive reports about compliance issues?

What are the goals of the organization’s compliance program?

What will be the level of resources necessary to implement the compliance program as envisioned by the Board?

The comments that accompany the questions emphasize the OIG’s position that an organization must assign high-level personnel to a compliance program and devote sufficient resources to the program. A board must also receive regular reports on the status of the compliance program.

The guidelines also contain a series of “operational questions” to assist the board in its evaluation of the effectiveness of the compliance program. These questions include:

Has the Code of Conduct or its equivalent been incorporated into corporate policies across the organization?

Has the organization implemented policies and procedures that address compliance risk areas and established internal controls to counter those vulnerabilities?

What is the scope of compliance-related education and training across the organization?

What is the process by which the organization evaluates and

responds to suspected compliance violations?

The comments related to the operational questions reiterate the need for an organization to establish a code of conduct to guide the compliance program. The comments also stress that an organization must implement effective policies and procedures to assess the day-to-day risks and respond appropriately to compliance issues and violations.

These guidelines should be required reading for all healthcare directors and officers. The OIG's stated purpose in issuing the guidelines is to assist directors in overseeing their compliance programs. The OIG will expect that Boards ask the appropriate questions to inform themselves sufficiently to fulfill their duty of care. In future enforcement actions the OIG and other government agencies will likely use the guidelines when judging whether Boards met their duty of care. Accordingly, Boards should review these guidelines and follow the OIG's recommendations. Compliance officers should prepare a report to the Board responding to the issues raised by the guidelines.

The guidelines, entitled "Corporate Responsibility and Corporate Compliance: A Resource for Health Care Boards of Directors", are available online at:

<http://oig.hhs.gov/fraud/docs/complianceguidance/040203CorpRespRsceGuide.pdf>.

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**This and other articles on healthcare law are available on the website of Ogden Murphy Wallace, PLLC at [www.omwlaw.com](http://www.omwlaw.com). For more information, contact any member of OMW's Healthcare Practice Group: Douglas E. Albright, Kent C. Meyer, Donald W. Black, Wesley Watson, Jr., Nick Beermann or Carrie Montgomery.**

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