

Corporate Responsibility and Corporate Compliance

Doug Hastings

Partner, Epstein Becker & Green, P.C.

If you serve on or advise a board, Sarbanes and Oxley are names you should recognize and know well. According to Doug Hastings, Partner of Epstein Becker & Green, PC, and a healthcare law expert, the *Sarbanes-Oxley Act of 2002* provides just about everything board members need to know about compliance. It does not, however, apply directly to nonprofit healthcare organizations. Mr. Hastings offered several other tips about *Corporate Responsibility and Corporate Compliance* at a lunchtime Governance Briefing organized by the University of Pittsburgh's Health Policy Institute on Friday, February 13, at the University Club in Oakland.

Hastings reported that the regulatory board overseeing compliance issues frequently uses as guidelines the *Sarbanes-Oxley Act*, the landmark *Smith v. Van Gorkam* case, and the *ABA Model Non-profit Corporation Act*. As an additional resource, he recommended reading *Corporate Responsibility and Corporate Compliance: A Resource for Healthcare Board of Directors*, developed jointly by the Office of Inspector General (OIG) of the US Department of Health & Human Services and the American Health Lawyers Association (AHLA) specifically to educate healthcare board members about compliance issues (available on the Web at, <http://oig.hhs.gov/fraud/docs/complianceguidance/040203CorpRespRscceGuide.pdf>).

Hastings helped draft the publication and recommends the structural and operational questions outlined in the OIG/AHLA publication.

Among the core principles of fiduciary duty Hastings listed:

- Duty of care – addresses good faith standard, requirement to make reasonable inquiry
- Duty of loyalty – addresses self-dealing and conflict of interest
- Duty of *obedience to purpose* in non-profit setting – charitable trust principles, IRS requirements, state Attorney General enforcements, and private actions.

Hastings stated that corporate fiduciary standards in the for-profit setting apply to non-profit corporations, but nonprofits also are accountable to the general public in part because of charitable trust principles and tax-exempt organization requirements.

Board members should at the very least understand their organizations' compliance programs. Hastings challenged boards to make sure a structure is in place to report issues that arise. As the risks associated with non-compliance grow, healthcare organizations rely more heavily on organizational compliance programs to fulfill regulatory requirements. To meet these obligations, he suggested documenting in board meeting minutes and other corporate files the reasons for actions taken. Board members should insist on more information if needed and feel comfortable asking questions to gain clarity of a situation. To make certain that the program works, Hastings advised healthcare organizations to invest adequate authority in compliance officers in the organizational context.

The expansion of regulatory enforcement and compliance activities in healthcare has focused attention on responsibilities of the corporate directors. With corporate responsibility issues making headlines across the nation and directors under greater scrutiny, Hastings urged trustees not to be afraid to accept the position of a director. He advised board members to actively engage in oversight of corporate compliance issues and also warned that inaction is grounds for director liability. He also cautioned that

failure to adhere to compliance regulations could result in civil damages, tax liabilities, equitable actions for removal and/or injunctive relief, and even criminal prosecution for board members.

“Do the right thing,” Hastings said. Nothing is as bad as an attempted cover up. He reminded board members to learn the basis and implications of key areas of board compliance focus, including the anti-kickback statute, the false claims act, Stark II, the civil money penalty statute, and Internal Revenue code.

In conclusion, Hastings reiterated his feelings on healthcare corporate responsibility with a quote from the OIG/AHLA publication, “Even in this ‘responsibility’ environment, the healthcare corporate director who is mindful of his/her fundamental duties and obligations, and sensitive to the premises of corporate responsibility, should be confident in the knowledge that he/she can pursue governance service without needless concern about personal liability for breach of fiduciary duty and without creating an adversarial relationship with management.”

Sanjay Galhotra and Linda S. Kalcevic

02/13/2004