Governance Notes

Avoiding Sticky Situations: Simple Steps for Creating a More Effective Conflicts Program

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Simply following your healthcare organization's conflict-of-interest policy is not enough—it's really just the start. Effective conflict programs go beyond just distributing policies and collecting annual questionnaires. Instead, they find creative ways to keep conflicts at the forefront of the board's attention, follow up on disclosed director interests, and evolve with changing organization activities. Creating an effective conflicts program and avoiding surprise conflicts does not have to be hard. Below are a number of easy steps any governance support professional can take to elevate their organization's conflict program to the next level.

Board Disclosures and Known Conflicts

Identifying Financial and Non-Financial Interests

Most organizations require at least an annual board review of its conflicts policy and written disclosure of any financial interests and material facts that could create actual, potential, or perceived conflicts. As part of this process, directors should be given a copy of the organization's policy and be required to sign a certification acknowledging receipt, understanding, and agreement to follow the policy. It is also a good practice to provide directors with examples of common financial interests and material facts that may give rise to conflicts of interests.

A better practice includes dedicating a portion of a board meeting to discuss the policy, common conflicts and hypotheticals, and changes within the organization that may create new conflicts for the coming year. Directors should also receive a copy of their disclosures from the prior year in order to reaffirm or revise previously disclosed relationships, as well as list new relationships.

Follow-Up Is Required

Reported interests are of little value to an organization if they are simply collected and filed away. **Effective conflict programs involve critically reading questionnaire responses, asking directors follow-up questions, and keeping summaries of disclosed interests readily available so that they are not forgotten as relevant discussions arise throughout the year**. When reviewing disclosures, the organization needs to ensure it has sufficient background and understanding of the disclosed interests in order to determine if a conflict exists, mitigate risk, and monitor compliance. This may mean supplemental requests for information from the reporting director, a meeting between the chief compliance officer and the director, or a discussion during a board or committee meeting. Regardless of how conflict follow-up occurs, it is important for the review of potential conflicts to occur in a timely manner to ensure the organization is not exposed to additional risk during the review process.

What Should You Document?

An organization must sufficiently document its full review of any potential conflicts. Records of disclosed personal interests should be recorded consistent with the organization's policy and at least include:

- The name of the disclosing director
- A description of the disclosed interest
- Any action taken to determine whether a conflict was present
- The board's decision as to whether a conflict in fact existed

Sensitive information such as financial calculations is not always necessary to include in board minutes even if such information was necessary for the board to review the conflict. It is important to remember, however, that despite the organization's attempt to preserve some confidentiality, certain federal and state laws require public disclosure of personal interests and conflicts. **As such, an organization should always consult its general counsel to determine related disclosure requirements, as well as specific federal and state laws governing conflicts of interest.**

Avoiding Surprise Conflicts

Keep the Conversation Going

The first step in avoiding surprise conflicts is to create an environment that promotes disclosure of financial and non-financial interests.

A key to ensuring full disclosure of interests is to create a corporate culture where directors feel a responsibility to come forward with conflicting interests as an ordinary part of their position. Organizations can create this culture in a number of ways, including by:

- Making conflicts a regular item on board agendas and during management meetings
- Addressing conflicts in concert with any new board actions or changes within the organization, such as material transactions, contracts, or purchases, or hiring or promotion of management
- Tying disclosures into overall organization operations, such as incorporating conflict clearance into a contract approval process

Double-Check Disclosures

In addition to providing previous disclosures to directors for their review and revision, compliance staff should make sure questionnaires and other forms of disclosures are compared with prior disclosures to ensure the organization is maintaining a complete and up-to-date record of interests. **In addition to reviewing disclosures, organizations should also consider tracking conflicts of interest reported elsewhere in their industry as a means to audit internal disclosures and facilitate active conversations with the board.**

Promote Inter-Board Reporting

Directors may unintentionally fail to disclose a potential or actual conflict of interest—or may intentionally conceal a conflict due to its sensitive nature (e.g., a romantic relationship) or due to a personal belief that they can act disinterested. In these circumstances, it is important for the organization to have mechanisms for other directors and employees to report the potential conflicts of which they are aware through confidential reporting. Although such reporting could be directed to the board chair, it is possible the chair herself/himself is the subject of the conflict or that board alliances may dissuade reporting. Therefore, using the compliance hotline may be the best mechanism to encourage such reporting. Once reported, the appropriate organizational representative would discuss the issue with the director and, to the extent necessary, place the matter on the agenda for discussion at the next board meeting.

As the discussion of conflicts becomes more engrained in everyday board culture, disclosures and discussions will become easier and more common place. Creating an effective conflicts program can be easier than you think. Just a few simple steps to follow up on director disclosures and to help your board continue to think about potential conflicts throughout the year can help your healthcare organization avoid its next sticky situation.

The Governance Institute thanks Megan R. Rooney, Partner, and Brad Dennis, Associate, McDermott Will & Emery LLP, for contributing this article. They can be reached at mrooney@mwe.com and bdennis@mwe.com.

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