

FELDESMAN

# THE BOARD'S ROLE IN ESTABLISHING AND MAINTAINING A COMPLIANCE PROGRAM

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May 2, 2025



COMMUNITY  
HEALTH CARE  
ASSOCIATION  
of New York State

# HRSA Funding Acknowledgement

This training is supported by the Health Resources and Services Administration (HRSA) of the U.S. Department of Health and Human Services (HHS) as part of an award to CHCANYS' New York State Primary Care Association (NYS-PCA) totaling \$1,932,890. The contents are those of the author(s) and do not necessarily represent the official views of, nor an endorsement, by HRSA, HHS, or the U.S. Government. For more information, please visit [HRSA.gov](https://www.hrsa.gov).



# TODAY'S PRESENTER

FELDESMAN

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Dianne advises health centers on implementing effective compliance programs and on addressing top compliance risk areas. A former compliance officer at a health center, she understands the challenges that health centers face in achieving and maintaining compliance.

Dianne also advises health centers and other organizations on patient privacy and confidentiality, including the HIPAA Privacy Rule and 42 CFR Part 2. She has experience responding to privacy and security incidents, notifying patients and the government, and creating corrective action plans.



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# THE BOARD OF DIRECTORS AND EFFECTIVE COMPLIANCE PROGRAMS

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# NON-PROFIT LAWS AND REGULATIONS

ARTICLE 7  
DIRECTORS AND OFFICERS

Section 701. Board of directors.  
702. Number of directors.  
703. Election and term of office of directors; alternates.  
704. Classification of directors.  
705. Newly created directorships and vacancies.  
706. Removal of directors.  
707. Quorum of directors.  
708. Action by the board.  
709. Greater requirement as to quorum and vote of directors.  
710. Place and time of meetings of the board.  
711. Notice of meetings of the board.  
712. Executive committee and other committees.  
712-a. Audit oversight.  
713. Officers.  
714. Removal of officers.  
715. Related party transactions.  
715-a. Conflict of interest policy.  
715-b. Whistleblower policy.  
716. Loans to directors, officers and key persons.  
717. Duty of directors, officers and key persons.  
718. List of directors, officers and key persons.  
719. Liability of directors in certain cases.  
720. Actions against directors, officers and key persons.  
720-a. Liability of directors, officers, trustees and key persons.  
721. Nonexclusivity of statutory provisions for indemnification of directors and officers.  
722. Authorization for indemnification of directors and officers.  
723. Payment of indemnification other than by court award.  
724. Indemnification of directors and officers by a court.  
725. Other provisions affecting indemnification of directors and officers.  
726. Insurance for indemnification of directors and officers.

New York Not-For-Profit Corporation (NPC) Law Article 7



# NON-PROFIT LAWS AND REGULATIONS

## § 717. Duty of directors, officers and key persons.

(a) Directors, officers and key persons shall discharge the duties of their respective positions in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances. The factors set forth in subparagraph one of paragraph (e) of section 552 (Standard of conduct in managing and investing an institutional fund), if relevant, must be considered by a governing board delegating investment management of institutional funds pursuant to section 514 (Delegation of investment management) For purposes of this paragraph, the term institutional fund is defined in section 551 (Definitions).

(b) In discharging their duties, directors, officers and key persons, when acting in good faith, may rely on information, opinions, reports or statements including financial statements and other financial data, in each case prepared or presented by: (1) one or more officers or employees of the corporation, whom the director believes to be reliable and competent in the matters presented, (2) counsel, public accountants or other persons as to matters which the directors, officers or key persons believe to be within such person's professional or expert competence or (3) a committee of the board upon which they do not serve, duly designated in accordance with a provision of the certificate of incorporation or the bylaws, as to matters within its designated authority, which committee the directors, officers or key persons believe to merit confidence, so long as in so relying they shall be acting in good faith and with that degree of care specified in paragraph (a) of this section. Persons shall not be considered to be acting in good faith if they have knowledge concerning the matter in question that would cause such reliance to be unwarranted. Persons who so perform their duties shall have no liability by reason of being or having been directors, officers or key persons of the corporation.

NPC § 717




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# FIDUCIARY DUTIES

-  **Duty of Care**  
The level of care that an ordinarily prudent person would exercise in a like position under like circumstances
-  **Duty of Loyalty**  
Undivided allegiance to the organization when making decisions affecting the organization
-  **Duty of Obedience**  
Observance of, and faithfulness to, the organizational mission

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## FIDUCIARY DUTIES

*In re* Caremark International Inc. Derivative Litigation: A Board's failure to adopt a Compliance Program may constitute a breach of fiduciary duties

A director has a duty to attempt in good faith to assure:

- An information and reporting system exists
- The system is adequate to assure the Board that appropriate information as to compliance with applicable laws will come to its attention in a timely manner as a matter of ordinary operations

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# OMIG'S DEFINITION OF EFFECTIVE COMPLIANCE PROGRAM

An “effective compliance program” [...] is adopted and implemented by the provider that, at a minimum, satisfies the compliance program requirements, and that is designed to be compatible with the provider’s characteristics. Being compatible with the provider’s characteristics means that the compliance program:

1. is well-integrated into the company’s operations and **supported by** the highest levels of the organization, including the chief executive, senior management, and **the governing body**;
2. promotes adherence to the provider’s legal and ethical obligations; and
3. is reasonably designed and implemented to prevent, detect, and correct non-compliance with Medicaid program requirements, including fraud, waste, and abuse most likely to occur for the provider’s risk areas and organizational experience.

OMIG Compliance Program Guidance: <https://omig.ny.gov/compliance/compliance-library>

# POTENTIAL CONSEQUENCES OF NOT HAVING AN EFFECTIVE COMPLIANCE PROGRAM

A provider [...] is potentially exposed to increased operational, reputational, service, and audit risks, as well as sanctions and the repayment of identified Medicaid overpayments. These consequences may include:

1. Monetary penalties up to \$5,000 for each month that a provider fails to adopt, implement, and maintain an effective compliance program. For a second violation, this amount may increase to \$10,000 per month.
2. Recoupment of monies paid to the provider during the period in which it did not have a compliance program.
3. Termination of the provider's enrollment in the Medicaid program.
4. Sanctions, up to and including exclusion from participation in the Medicaid program.

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# 7 ELEMENTS OF COMPLIANCE IN NEW YORK

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Written Policies,  
Procedures, and  
Standards of Conduct

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Compliance Officer  
and Compliance  
Committee

3

Compliance Program  
Training and  
Education

4

Lines of  
Communication

5

Disciplinary  
Standards

6

Auditing and  
Monitoring

7

Responding to  
Compliance Issues

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# BOARD OF DIRECTORS: RESPONSIBILITIES

Related to written policies:

- Receive, review and acknowledge all applicable written policies. (18 NYCRR § 521-1.4(a)(2))

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# BOARD OF DIRECTORS: RESPONSIBILITIES

Related to the compliance officer:

- Receive, review and respond to quarterly reports from the compliance officer on the progress of adopting, implementing and maintaining the compliance program. (18 NYCRR § 521-1.4(b)(1)(iv))
- Ensure the compliance officer is allocated sufficient staff and resources to satisfactorily perform their responsibilities for the day-to-day operation of the compliance program based on the required provider's risk areas and organizational experience. (18 NYCRR § 521-1.4(b)(4))
- May approve a resolution or otherwise receive updates on the appointment of the compliance officer.

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## BOARD OF DIRECTORS: RESPONSIBILITIES

Related to the compliance committee:

- Receive, review and respond to quarterly reports from the compliance committee. (18 NYCRR § 521-1.4(c)(3))

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## BOARD OF DIRECTORS: RESPONSIBILITIES

Related to compliance program training and education:

- Complete compliance program training, either annually or as part of orientation. (18 NYCRR § 521-1.4(d)(2))

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## BOARD OF DIRECTORS: RESPONSIBILITIES

Related to disciplinary standards:

- Develop, maintain and enforce disciplinary standards for the governing body (bylaws, procedures, etc.). (18 NYCRR § 521-1.4(f)(1))

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## BOARD OF DIRECTORS: RESPONSIBILITIES

Related to auditing and monitoring:

- Receive, review and respond to results of:
  - Internal and external audits. (18 NYCRR § 521-1.4(g)(1)(iii))
  - Annual compliance program review. (18 NYCRR § 521-1.4(g)(2)(iv))

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## PROGRAM REPORTING TO BOARD: OVERVIEW

Quarterly Compliance  
Officer Reports

Quarterly Compliance  
Committee Reports

The Board

Results of Internal &  
External Audits

Results of Annual  
Program Review

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# ALLOCATING RESOURCES



# BOARD OF DIRECTORS: CHECKLIST

- ☐ Receive, review and respond to reports from:
  - Compliance officer: At least quarterly
  - Compliance committee: At least quarterly
  - CEO and other senior leaders
- ☐ Receive, review and respond to results of internal and external audits, including:
  - Audits of identified risk areas
  - Annual compliance program review
- ☐ Ensure compliance officer is allocated sufficient staff and resources to satisfactorily perform responsibilities for the day-to-day operation of the compliance program



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