Corporate Governance, Health Care Quality, and Accountable Care

By Douglas A. Hastings

Corporate Governance Developments
The past decade has seen a revolution in corporate governance and in the expectations set for corporate directors. Fiduciary duty has come to mean that directors must be active participants in oversight, not mere passive recipients of information. A good director must engage in active inquiry and be demanding enough to rattle cages when necessary; be knowledgeable enough to set direction; be bold enough to add value through hard questions; and be vigorous enough to assure that the organization’s plans yield results. Yet, a director must not lose sight of the difference between oversight and day-to-day management.

Fiduciary Challenges and Opportunities in the Accountable Care Era
Health care provider organizations face a variety of challenges and opportunities in the accountable care era. As fiduciaries, board members must address several key issues in this period of payment reform. Fee-for-service payments are likely to decline steadily in the years ahead, challenging financial performance. Additional payment changes will further reduce reimbursement to providers who score poorly on quality measures or who evidence inefficiencies such as above-average readmissions. The shift to various forms of pay for performance, bundled payments, global- or population-based payments, and other value-based reimbursement methodologies will require infrastructure investments by providers that may or may not be reimbursed, further threatening financial solvency.

With the increasing focus on quality measurement and reporting, boards are faced with the prospect that these initiatives may uncover indications of fraud and abuse and trigger judgments against providers making claims to public and private payers for care that is ultimately deemed substandard. Expanded quality data reporting and transparency requires board oversight to assure that the reports are accurate and that compliance plans are enhanced to address these expanded concerns. It is the responsibility of a provider entity board to review the organization’s committee structure to ensure that the board and/or board committee’s charter specifically requires attention to effectiveness, efficiency, and patient-centeredness in addition to patient safety.

Finally, Accountable Care Organization (ACO) boards and ACO sponsoring organization boards must ensure that appropriate and effective management of clinical personnel and protocols are in place to meet the Centers for Medicare and Medicaid Services (CMS), National Committee for Quality Assurance (NCQA), and other requirements and to achieve the ACO’s quality and financial goals. Health systems and physician organizations seeking to create ACOs must consider which entity – one that currently exists or one to be formed – will serve as the ACO (including how many ACOs it may want to form or work with) and how to coordinate the ACO board or boards with other boards within the health system.

Medicare Shared Savings Program Final Rule – Structure and Governance
The formation of a new entity to serve as a Medicare ACO is not required if an existing entity (or entities) meets all of the applicable requirements set forth in the rule. The ACO governing body nevertheless must include participating ACO providers and suppliers (or representatives) and Medicare beneficiaries (or representatives) – at least 75% control of the governing body must be held by ACO participants (providers and suppliers).

The Final Rule removed the Proposed Rule’s controversial requirement that each ACO participant must have “appropriate proportionate control over governing body decision making.” The Pioneer Model includes an additional requirement that the ACO board include a “consumer advocate.” These governance representation requirements raise questions about the fiduciary duty of ACO governing boards (ie, governing board members’ allegiances generally will be to the ACO rather than to the particular providers or groups they represent).

NCQA ACO Accreditation Guidelines – Governance
NCQA scores an ACO on the effectiveness of the role, structure, and functions of its governing body, including, “how well the governing body provides leadership, establishes accountability and provides the structure to align the functions of an ACO.” NCQA criteria state that the designated physician or clinician leader of the ACO “must participate on or advise the board” or “have a substantial management function.” NCQA also requires an ACO to have a documented process for annually reviewing the ACO’s performance and the ACO governing body’s performance. ACO governing bodies also must assure that the following stakeholder...
groups are involved in its oversight functions: primary care practitioners and specialists who provide care for the ACO’s patients; hospitals that provide care for the ACO’s patients; consumers (eg, individual patients, consumer organizations) who do not have a financial or business stake in the health care system; and purchasers.  

Balancing Representational Requirements

ACO boards must balance stakeholder representation (required by CMS or NCQA) with Internal Revenue Service (IRS) requirements related to community representation, when applicable, as well as with both IRS and good governance recommendations related to the need for a reasonable number of “independent” directors on boards. Ultimately, the director’s job is not to “represent” a particular faction or constituency in exercising oversight in accord with the duty of care; rather, a director must act in the overall best interest of the organization for which he or she is a fiduciary. This differs from duty on an advisory board or duty as a provider representative viewing a contract negotiation with a payer or another provider. ACO sponsoring organization board members and ACO board members must clarify their respective missions, visions, and goals - and understand the differences between them.

Governance in the Accountable Care Era

Focused, intentional governance in the accountable care era calls for board members to be both educated and proactive. This requires robust recruiting and educating of directors with the right skill sets; providing ongoing information that is incisive and detailed enough to allow for effective oversight without excessive, unnecessary detail; and having in place evaluation mechanisms that allow the board to continuously improve its performance. Key areas of board oversight in the accountable care era include measuring and managing value, maximizing patient and physician stakeholder engagement, enhancing outcomes reporting transparency, strengthening internal pay-for-performance programs while remaining legally compliant, and making the board’s work more intentional.

Making the Board’s Work More Intentional

It will not be easy to attract, engage, and retain superior board members in this new era of high-performance governance. For board members to believe their time and talents are being maximized, new cultures and systems must be developed to govern tomorrow’s integrated and accountable care delivery systems.

High-performance boards must continuously explore and practice intentional governance that embraces attributes such as:

1. Competency-based governance by means of recruiting and educating diverse and talented board members to achieve a balanced set of skills, attitudes, and experience within the board and its committees, advisory councils, and task forces.

2. Information for governance decision making that is driven by data from electronic health records, episodes of care cost profiles, and satisfaction scores of patients, physicians, employees, and purchasers.

3. Fewer but smarter meetings with agendas that encourage meaningful conversations with expert speakers, clinicians, middle managers, and industry analysts about strategic challenges and future opportunities, rather than reviewing past statistics.

4. Patient stories that ground and inform the board’s deliberations about the reality of clinical frontline challenges and the continuous call for value from care that is convenient, comfortable, customized, and cost-effective.

5. Governance processes and structures that are evaluated each year to develop “governance enhancement plans.”

Accountable care demands accountable governance. Great boards must engage in critical conversations about governance best practices in their journey toward continuous governance improvement in the accountable care era.

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References


