For nursing homes, conflicts of interest have become a hot button issue. Why? Because conflicts are tied directly to the integrity of the nursing facility’s decision-making processes. Unresolved conflicts and tainted decisions can waste corporate assets, corrupt cost reports through concealed “related-party” transactions, expose the nursing facility to legal action, and even threaten its tax-exempt status. Individuals in management and on boards face civil or even criminal exposure if they are found to defraud their institutions’ “honest services.”

In light of increasing sensitivity to the conduct of directors, officers, and management, here is a closer look at conflicts of interest.

What is a conflict of interest? A conflict of interest refers to circumstances in which one’s activities, financial interests, or positions outside of the facility potentially or actually conflict with one’s fiduciary, contractual, or professional responsibilities to the nursing home. Actual or potential conflicts of interest include:

- doing business with or competing with the nursing home
- using one’s position at the facility to influence its business decisions for improper self-gain or advantage
- using information obtained through a position at the facility to the detriment of the facility or for self-gain or advantage
- otherwise acting to the nursing home’s detriment

The question is, “When should a nursing home employee disclose a conflict of interest?” Outside relationships should be brought to light if they involve a financial or other type of association (lender, consultant, etc.) with a business or government entity that:

- provides goods or services to the facility
- receives goods or services from the facility
- competes with the facility
- provides regulatory, inspection, supervision, accreditation, or other oversight to the nursing home
- is involved—or likely to become involved—with litigation or other actions adverse to the facility

Achieving disclosure

Boards of nursing homes should consider adopting a formal “conflict of interest” policy. It should be concise, written in understandable English, provide examples of problematic relationships, and be vetted by the facility’s counsel.

Boards should meet sensitive issues head-on in their policy. They should address matters such as how much of an outside investment creates a conflicting financial interest, the acceptance of broker’s or finder’s fees, and the offering of real estate and other business opportunities to the nursing facility.

A complete policy should also speak to the use of proprietary or confidential information, the employment of relatives, and “conflicts of commitment.” This last topic involves activities that either interfere with the ability to meet one’s responsibilities to the nursing home or compromise or appear to compromise the name or reputation of the facility.

Simultaneously, the board should

Avoiding Conflicts of Interest

New York Supreme Court Justice Benjamin Cardozo once found that “a trustee is held to something stricter than the morals of the marketplace.” Almost 80 years later, the wake of corporate scandals such as Enron has fostered a “paradigm shift” in the expected roles of management and boards, with vast implications for compliance officers in every setting, including skilled nursing facilities.
require board members, officers, and key management personnel designated by the CEO to fill out an annual written conflict disclosure statement. The board should then review the statements and act upon any conflicts disclosed.

Finally, the board must implement a policy for resolving conflict situations. The policy must spell out process issues—such as the timing of conflict disclosures to the board, guidelines for discussing and resolving conflict situations, guidelines for removing oneself from participation to avoid a conflict of interest, and rules for debating and voting on issues for which some members have conflicts.

Ultimately, the nursing home must be able to document, through its board minutes and otherwise, that it made its decisions in good faith and in the best interests of the facility. For any particular business transaction in which a conflict of interest arises, these documents should reflect how the conflict was resolved, that the facility obtained fair market value, and that the nursing home could do no better with reasonable efforts.

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The nine commandments

In order to avoid conflicts of interest, nursing home board directors, officers, and key management personnel should abide by the following guidelines:

1. Acknowledge that they owe the nursing home undivided loyalty, good faith, and fair dealing.
2. Commit to administering the affairs of the facility in its best interest, acting honestly, economically, and using best care practices.
3. Avoid directing or seeking to influence—directly or indirectly—decisions, votes, or actions upon matters in which they have a conflict of interest.
4. Avoid seeking to improperly profit—directly or indirectly—or assist others in profiting through business or competition with the nursing home.
5. Do not disclose or use—directly or indirectly—privileged, confidential, or proprietary information of the facility or seek to profit from the disclosure or use of nursing home information.
6. Avoid letting their activities outside of the nursing home interfere with meeting their job responsibilities.
7. Do not allow their outside interests or activities to compromise or appear to compromise the name or reputation of the nursing facility.
8. Disclose in writing annually any actual or potential conflicts of interest.
9. Update and disclose in writing immediately any actual or potential conflicts of interest that arise.

—Ron Levine, Esq.