

The Role of the Board in Hospital Compliance: A Checklist to Analyze Your Board's Performance-Part 2

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What is the appropriate role for the governing body of a health care organization (its "board") in its attempts to comply with the wide variety of laws and regulations to which it is subject regarding the submission of claims, fraud and abuse, and Stark? In Part 1 of this two-part article, the authors began by addressing this question, setting forth four specific issues and providing a brief history of government pronouncements on compliance, including some recent pronouncements. In this Part 2, the authors suggest a practical guide to compliance, including a discussion of organizational education, compliance program structure, and evaluation of compliance within the organization.

A Board's Practical Guide to Compliance

Because most health care organizations already have a compliance plan, this article does not deal with the task of putting in place a plan where none now exists, or with the specific content of the plan. Rather, we assume that such a plan is in place and ask what the board should do now.

We begin with education.

Has your organization provided education to all board members regarding the need for a compliance program? If the board is to have oversight responsibility for the compliance operations of the organization, how can it fulfill that responsibility if it does not understand the need for a compliance program in today's environment? Education is the key. We do not mean to suggest that every board member must become an expert in health care compliance. We do mean to suggest that a periodic program on the particular need for robust compliance operations in a highly-regulated industry like health care is an absolute essential. Many board members, who come from other regulated industries, will quickly grasp the need for such activities. Some, who are community leaders but not from such industries, may find this subject a bit of a mystery. A periodic educational session for the board – and a primer for newly-elected board members – seems essential. Ask your outside counsel to present a session at a board meeting on compliance in the health care industry. Keep records of the presentations and who attended. Impose a requirement that every board member receive this instruction.

Has your organization explained to all board members the principal elements of your compliance

program? Does the board understand how its plan works? We've assumed that the organization has a compliance plan. The board needs to understand what's in it and how it works. Is there an internal audit function? Is there a hotline? What happens to audits or complaints to the hotlines? Who is trained about compliance and on what subjects? In short, the board needs to understand the core elements of the organization's compliance plan.

Has your organization explained to all board members on what substantive areas the compliance program will focus in the current year, and why those were chosen? Most compliance officers place specific emphasis on topics which they know will be of interest to third parties, most particularly Medicare and Medicaid. What are the topics on which your compliance program will focus in the upcoming year, and why were they chosen?

Has your organization described for the board the resources devoted to compliance? If, as we will see below, the board is to evaluate periodically the effectiveness of the compliance program, it should know what resources – people and money – the organization devotes to such activities. Can the compliance officer reasonably accomplish the goals set for him/her with the resources available?

We turn next to an evaluation of the program's structure.

Should the board delegate to a committee responsibility for compliance and, if so, what authority should the board committee be given? Most boards of health care organizations delegate important responsibilities to board committees. Compliance is no exception. Indeed, the HHS-OIG/AHLA publication specifically recommends

the appointment of a board compliance committee.¹⁰ A suggested Draft Resolution Delegating Compliance Responsibilities to a Committee of the Board is provided at the end of the article. We see no reason why compliance responsibilities require a separate board committee, although there certainly would be no objection to such a structure. Many organizations combine compliance responsibilities with the audit committee. If compliance responsibilities are delegated, is there any role for the board itself to play thereafter? We believe that the answer to that question is a resounding yes. The educational activities described above should still involve the board, whose fiduciary responsibilities to the organization require their education and ultimate oversight. What about the structural recommendations which follow? We will deal with the board committee versus board issue in the context of each.

Does the compliance officer have direct access to the organization's CEO, without having to obtain permission from any other official? The sources discussed above make it clear that the compliance officer should report directly to the organization's CEO. What is not clear is whether a reporting relationship that runs through an intermediary official, who himself/herself does report directly to the CEO, is sufficient. So long as the compliance officer can on his/her own motion have "direct access" (see below for a discussion of the meaning of this term) to the CEO, it would not seem to matter. The compliance officer should not report, however, to the CFO or to the chief legal officer. The HHS-OIG admonished that there is "some risk" of the compliance officer reports to the corporation's in-house lawyer.¹¹ The reason for this appears to be that the lawyer may have already approved something which has now been raised as a possible compliance issue. (The same would appear to be the case with the CFO.) The potential for conflict in such situations is obvious.

What should be the day-to-day relationship between these two important positions? Two things should be said. First, in all except the situation mentioned above – where the compliance "issue" is something which the lawyer has already approved – the relationship between compliance officer and in-house lawyer should be complementary. The two should work in tandem to understand the potential issue and its relationship to the pertinent law or regulation. Second, by working together in the investigation of the issue, or by soliciting the in-house counsel to find appropriate outside lawyers to investigate and advise, the corporation's investigation of a matter can be protected by the attorney-client privilege. This privilege can be important in some cases to allow the corporation to receive the advice of a trained professional and determine together how a matter should be handled without that deliberative process being open to discovery. In short,

in most cases, the relationship between the compliance officer and in-house lawyer should be cooperative.

Under what circumstances can the compliance officer meet directly with the board or board compliance committee? All of the sources advocate that the compliance officer have "direct access" to the board. None of them explains what is meant by this term. Many health care organizations have board committees responsible for compliance. If such a committee exists, shouldn't the compliance officer in almost every case have the ability – indeed, shouldn't it be the expectation that he/she will meet – to meet directly with this committee on a regular basis? If this is the case, and we see no reason why it should not be, is there any circumstance in which the compliance officer could bypass the board committee and go directly to the full board? We see no persuasive reason for this.

The pertinent question becomes, then, in what circumstances should the compliance officer report directly to the board committee without first reporting to the CEO? Clearly, in any typical entity, the compliance officer should take matters first to those to whom he/she reports (assuming that it is someone other than the CEO) and, ultimately to the CEO. Can the compliance officer ever bypass the CEO and go directly to the board compliance committee (or the board, if no board committee exists, or the board committee refuses to act)? The answer to this question is yes, but only in one of two situations: (1) the alleged compliance issue is that the CEO has violated the law, or (2) the CEO, having been informed of the issue, has refused to deal with it. In situation (1), the compliance officer must take the issue directly to the compliance committee chair (or, in the absence of a committee or if the board committee refuses to act, to the board chair) and ask very difficult questions: How do you want to deal with this? Do we want to hire someone from the outside to investigate this? In situation (2), the need for the compliance officer to go directly to the committee chair seems apparent, but after saying to the CEO that his/her refusal to deal with issues will have that result. We see no other situations in which "direct access" to the board committee or board is appropriate.

What information about compliance issues faced by your organization does your board or board committee receive? This question begs the real question: what information does the board committee or board need? The committee or the board needs to know about significant compliance matters and how the corporation is addressing those risks. This does not mean, of course, that every call to the compliance program's 800 number is reported to the board. Nothing would typically be reported until an investigation, conducted by the compliance officer or counsel, revealed there to be a problem of some significance. We think it

self-evident that investigations by governmental agencies and lawsuits of significance should be reported. How else can the board committee or board be expected to know about whether the compliance program is effective in preventing compliance issues and, after they surface, resolving them successfully? If the organization has a board committee, when should the committee report such matters as are brought to it to the full board? Must those reports be made by the compliance officer, as opposed to the chair of the board committee? Regular reports would seem advisable, probably with the same frequency as reports from other significant committees. We regard it as unimportant whether the reports are made by the compliance officer himself, as opposed to the committee chair.

What are the limits, if any, on the compliance officer's ability to address problems directly on his/her own? Note the 2005 suggestion from the HHS-OIG that the compliance officer have the authority to retain separate legal counsel.¹² This suggestion squarely raises the question of the independent authority of the compliance officer. What are appropriate limits on this authority? Clearly, in most cases, the compliance officer will work through channels, and that is how it should be.

If working through channels is not working, however, we have already discussed the necessity for the compliance officer to go directly to the CEO. In turn, if the CEO is the problem, the compliance officer should have direct access, i.e., the ability to initiate a face-to-face meeting, with the board compliance committee or, in the absence of such a committee or in the face of its refusal to act, with the board itself. Having taken this significant step, should the compliance officer have any other independent authority? We can see no reason why he/she should, having raised the matter directly with board representatives. From that point, the compliance officer should act at the direction of the board committee or board, whichever has responsibility.

Finally, we look at the board's evaluation of compliance within the organization.

Has the board or board committee asked the organization's leaders how they will measure whether the compliance program is effective, and is the board satisfied with the answer? As noted above, the board or board compliance committee will receive regular reports of compliance matters. How will the board or board committee evaluate whether the compliance program is effective? In the first instance, as the HHS-OIG/AHLA publication suggests, the board or board committee should insist that the CEO or other appropriate senior official evaluate the effectiveness of the program.¹³ What will be the measures of effectiveness that will be employed? Here are some suggestions. Is there a confidential hotline for employees and others to report suspected compliance matters? How many matters are being reported on the hotline? The absence of reported matters may signal a workforce that doesn't believe that reports will be taken seriously or that fears retaliation. Conversely, is an unusually high number of significant

matters being reported? If so, why? The board must be concerned in such a situation about whether sufficient resources have been devoted to compliance and about whether those in charge of the program have done a sufficient job in finding and eliminating compliance issues. Are matters languishing? If so, the board must be concerned about the effectiveness of the compliance operation and the organization's leadership in dealing head-on with matters of such importance. Agreeing on the measures of effectiveness ahead of time will itself assist in the education process.

In addition, the board or board committee should be insistent on when the measurement will occur, and then engage in rigorous evaluation. And such an evaluation should be made with regularity, probably once a year, so that the budget for the upcoming period can be adjusted, for example, to allow additional resources to be brought to bear on this crucial area if its effectiveness is suspect.

Conclusion

Few areas within the operations of a health care organization present greater risk to the organization than the failure to comply with state and federal laws and regulations relating to the submission of claims, fraud and abuse, and Stark. Yet, most boards pay scant attention to the organization's best defense against this risk – the compliance program. If the board cannot answer each question posed (see checklist below) in this article appropriately, its members may not be paying sufficient attention.

A Board Checklist on Compliance:

- Have all board members received education on the need for a compliance plan?
- Does the board understand how the plan works?
- Does the board understand the plan's focus?
- Has the board formally delegated compliance responsibility to a committee?
- Does the board receive regular reports about significant compliance matters facing the organization?
- Does the compliance officer have an appropriate reporting relationship and adequate authority and resources?
- Does the board regularly evaluate the effectiveness of the compliance program?

Draft Resolution Delegating Compliance Responsibilities To A Committee Of The Board

Whereas, the Board of Directors of the Corporation has ultimate responsibility for ensuring that the Corporation operates in compliance with all state and federal laws and regulations;

Whereas, [the Board wishes to] [the Bylaws] give the _____ Committee primary responsibility for monitoring the Corporation's compliance efforts; and

Whereas, the Board desires to state clearly its desires regarding the Committee's responsibilities;

On The Front Lines (cont.)

NOW, THEREFORE, IT IS HEREBY RESOLVED as follows:

- (1) The Committee shall meet as often as necessary, but not less than quarterly, with the Corporation's compliance officer for the purpose of receiving an oral and written report on the operation of the compliance program and any significant, pending compliance matter.
- (2) The Committee shall meet with the compliance officer at any other time the compliance officer requests a meeting.
- (3) The Committee shall report to the Board, either orally or in the form of minutes of the Committee's most recent meeting with the compliance officer, highlighting the operation of the compliance program and any significant, pending compliance issue.
- (4) The Committee is directed to meet at least once each fiscal year with the Corporation's Chief Executive Officer and compliance officer, together with such other officers, agents and employees of the Corporation as desired by the Chief Executive Officer, for the purpose of establishing a methodology to measure the effectiveness of the compliance program. The Committee will report this methodology to the Board and will, at a time determined by the Committee, conduct such an evaluation. The results of this evaluation shall be reported to the Board.
- (5) From time to time, the Committee shall consider whether amendments to the compliance program should be adopted in order to increase its effectiveness, and shall propose such amendments to the Board it deems necessary and appropriate.
- (6) The Chair of the Committee shall have direct access at all times to the Chairman of the Board of the Corporation for the purpose of discussing any matter regarding compliance. ■

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¹⁰ Such a board committee is in addition to the organization's compliance committee, usually headed by the compliance officer and composed of individuals – either employees or independent contractors – who are not board members.

¹¹ 63 FR 8993 (Feb. 23, 1998), fn. 35.

¹² 70 FR 4875 (Jan. 31, 2005).

¹³ Corporate Responsibility and Corporate Compliance, 2003, p. 5.